Indian Claims Commission

LONG PLAIN FIRST NATION INQUIRY

Report on: Loss of Use

102-02622/

Indian Claims Commission

Commission des revendications des Indiens

March 1, 2000

Chief Marvin Daniels and Council
Long Plain First Nation

The Honourable Robert Nault
Minister of Indian Affairs and Northern Development

The Honourable Anne McLellan
Minister of Justice and Attorney General of Canada

RE: Long Plain First Nation Inquiry - Loss of Use Claim

On April 12, 1995, counsel for the Long Plain First Nation wrote the Commission requesting an inquiry on behalf of their client. The Commission began its work by convening a first planning conference on August 29, 1995, where the parties discussed the issues pertaining to this claim and the conduct of the inquiry.

By agreement of the parties a Joint Statement of Agreed Facts was prepared and approved as the factual background to this claim. The parties also agreed that it was unnecessary to convene a community session. On October 17, 1997, the panel of Commissioners heard oral submissions of legal counsel for the parties on the question of whether Canada owes an outstanding lawful obligation to the Long Plain First Nation for the loss of use of a treaty land entitlement shortfall.

Our review of the facts of this claim, together with our legal analysis, findings, and recommendation to the parties, is set out in the attached report, which we are honoured to present to you on this date.

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INDIAN CLAIMS COMMISSION

LONG PLAIN FIRST NATION INQUIRY
LOSS OF USE CLAIM

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February 2000

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EXECUTIVE SUMMARY

On August 3, 1871, the Government of Canada and the Indians of southern Manitoba – including the Portage Band – entered into Treaty 1, the first of the numbered prairie treaties. That treaty entitled the members of the Portage Band to a tract of land for their use and benefit which was to be of sufficient size to provide the Band with 32 acres of land for each band member.

Treaty 1 was amended on June 20, 1876, when the Portage Band was divided into the Long Plain and Swan Lake Bands. Chief Short Bear of the Long Plain Band selected the site of the Long Plain reserve in July of that year, and Canada's surveyor, J. Lestock Reid, marked off sufficient land for 165 people under the treaty formula. Canada eventually formalized the setting apart of these lands by Order in Council 2876 on November 21, 1913.

It seems both unfortunate and incontrovertible that the acreage set aside by Canada in 1876 did not reflect the actual population of the Long Plain Band, which at that time appears to have constituted at least 223 people. The shortfall in the acreage of land set aside gave rise to a claim described in law as a treaty land entitlement shortfall claim.

On November 5, 1982, John Munro, at that time the Minister of Indian Affairs, accepted Long Plain's claim of an outstanding treaty land entitlement under the Government of Canada's Specific Claims Policy. With respect to the government's obligation to provide the shortfall lands, the parties eventually negotiated a Settlement Agreement dated August 3, 1994. That agreement provided the First Nation with funds totalling $16.5 million while still allowing the First Nation to advance a claim to the Indian Claims Commission with respect to compensation for "loss of use" of the shortfall acreage. For its part, Canada reserved in the Settlement Agreement the right to maintain that there was no shortfall.

A claim for loss of use encompasses those compensatory or restitutionary claims advanced by a band because its full entitlement of reserve land was not set aside "on time." In this case, Long Plain did not receive funds in compensation for the outstanding settlement lands until 118 years after the reserve was set aside. This loss of use claim seeks compensation for the fact that the First Nation did not have those additional acres – in effect, it lost the use of them – for that 118-year period.

The Commission has been asked to decide whether a band with an admitted shortfall in its treaty land entitlement is entitled to be compensated for its loss of use based upon the Specific Claims

Policy. The Policy indicates that this question turns upon the issue of whether loss of use can be said to form part of Canada's outstanding "lawful obligation."

The Commission concludes in this report that a band such as Long Plain is indeed entitled to advance a compensation claim for its loss of use of a treaty land entitlement shortfall acreage. In our view, loss of use is compensable as part of Canada's outstanding lawful obligation. We base our conclusion upon the finding that Canada's failure to deliver the First Nation's entire land entitlement amounts to a *breach of treaty*.

There is, in addition, a second, concurrent foundation for Canada's liability. Since Canada has failed to fulfill the trust-like responsibilities it owes to the First Nation in respect of matters concerning Indian title, it is also in *breach of a fiduciary duty*. However, although it is our view that an enforceable cause of action in favour of Long Plain can be established on the basis of *either* breach of treaty or breach of fiduciary duty, we do not predicate our conclusion in this report upon the latter ground.

Moreover, we decline to decide whether Canada's conduct in this case substantiates a separate cause of action based upon breach of other fiduciary duties owed to the First Nation. We believe that it is unnecessary for us to decide this point because the essential cause of action – namely, breach of treaty – has already been made out. In addition, we are concerned that the limited evidentiary basis placed before us is inadequate for that purpose in any event.

We have also provided very clear direction to Long Plain and Canada with respect to what we believe to be the proper approach to the quantification of such a loss of use claim. We have concluded that a claim of this nature, whether characterized as a breach of treaty or a breach of fiduciary duty, gives rise to an equitable jurisdiction in the determination of compensation. Therefore, all the factors that would be relevant in such a case in a court of equity must be considered to arrive at a result that is just, equitable, and proportionate to the wrong suffered. In particular, a court may have full regard for the conduct of both Canada and the band within the appropriate historical context, but also to common law principles of foreseeability, remoteness, causation, and mitigation. Canada's state of knowledge relative to the existence of the claim is one relevant consideration. So, too, is any explanation that Canada may offer for its failure to respond to the claim at an earlier date. Obviously, the amount of land at issue, the economic value of that land, and the period of time during

which the obligation remained outstanding are also very relevant. In our view, all these matters relate to the *quantification* of the First Nation's entitlement to compensation once it has been established that Canada is in breach of the terms of the treaty. Further characterizing Canada's conduct as a breach of fiduciary duty neither adds to, nor subtracts from, the remedies available in assessing compensation.

In conclusion, it is our recommendation that Canada accept and negotiate Long Plain's claim to be compensated for loss of use of the shortfall acreage. The Commission is certainly prepared to assist the parties in the determination of compensation, if requested.

PART I

INTRODUCTION

On August 3, 1871, the Government of Canada and the Indians of southern Manitoba – including the Portage Band, as represented by Chief Oo-za-we-kwun – entered into Treaty 1, the first of the numbered prairie treaties. That treaty entitled the members of the Portage Band to a tract of land for their use and benefit which was to be of sufficient size to provide the Band with 32 acres of land for each band member.

Treaty 1 was amended on June 20, 1876, when the Portage Band was divided into the Long Plain and Swan Lake Bands. Chief Short Bear of the Long Plain Band selected the site of the Long Plain reserve in July of that year, and Canada's surveyor, J. Lestock Reid, marked off sufficient land for 165 people under the treaty formula. Canada eventually formalized the setting apart of these lands by Order in Council 2876 on November 21, 1913. The location of the Long Plain Indian Reserve (IR) 6 is shown on map 1 (see page 2).

However, it appears that the acreage set aside by Canada in 1876 did not reflect the actual population of the Long Plain Band, which at that time appears to have constituted at least 223 people. On November 5, 1982, John Munro, at that time the Minister of Indian Affairs, accepted Long Plain's claim of an outstanding treaty land entitlement under the Government of Canada's Specific Claims Policy, and the Band and the government eventually negotiated a Settlement Agreement dated August 3, 1994.[1] That agreement provided funds in compensation for the shortfall acreage, but at the same time allowed the First Nation to advance a claim to the Commission with respect to compensation for loss of use of that acreage.

The Commission has been asked to decide whether a band with an admitted shortfall in its treaty land entitlement is entitled to be compensated under the Specific Claims Policy for the band's loss of use of the shortfall. The question that must be decided in this inquiry is whether compensation for loss of use can be said to form part of Canada's outstanding "lawful obligation" under the Policy.

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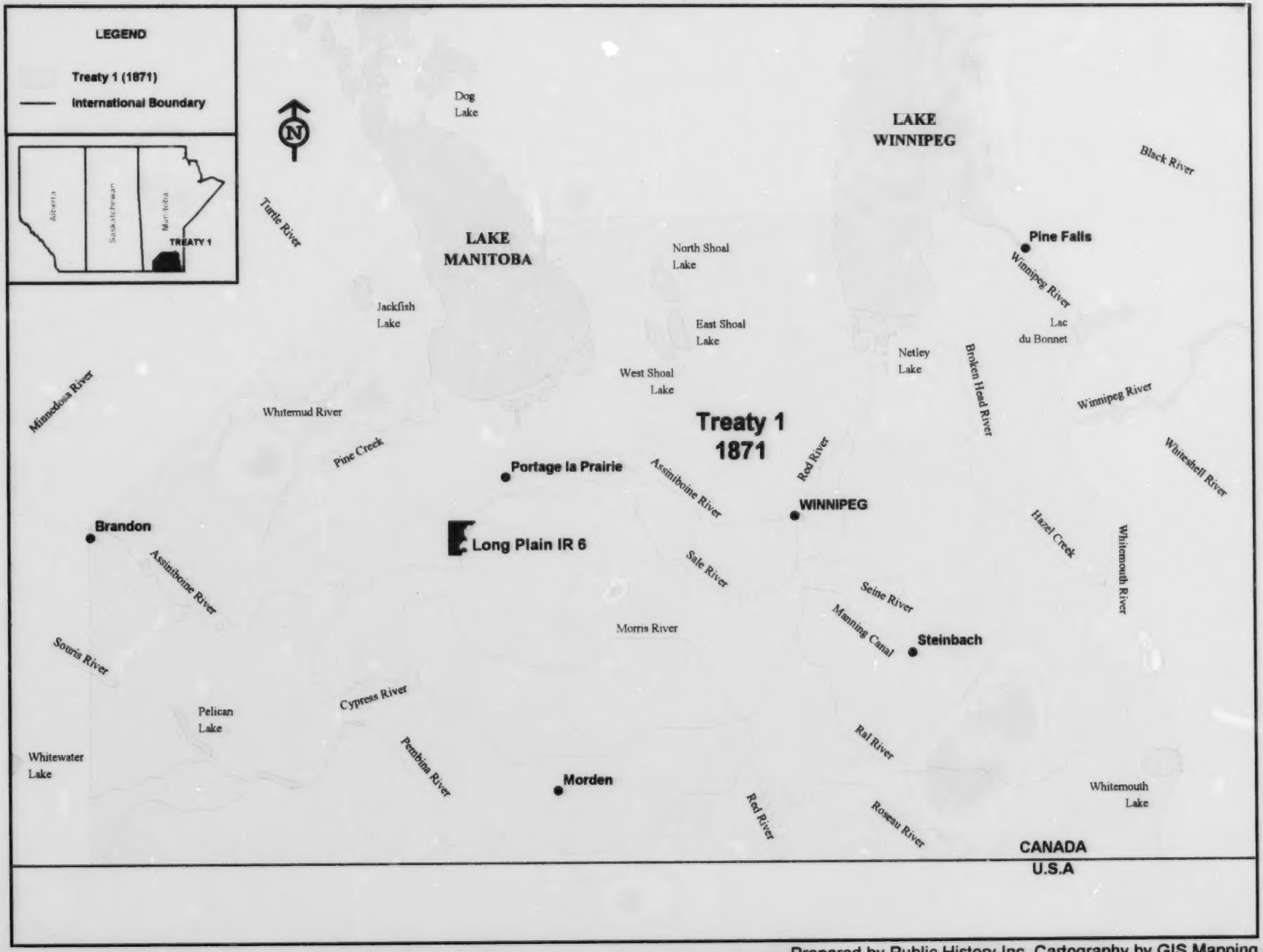
[1] Treaty Land Entitlement Settlement Agreement between Her Majesty the Queen, in right of Canada, as represented by the Minister of Indian Affairs and Northern Development, and the Long Plain Indian Band (also known as the Long Plain First Nation), as represented by its Chief and Councillors (hereafter the "Settlement Agreement"), August 3, 1994 (ICC Documents, pp. 519-696).



Prepared by Public History Inc. Cartography by GIS Mapping

THE SETTLEMENT AGREEMENT AND BACKGROUND TO THE INQUIRY

The Settlement Agreement of August 3, 1994, between the Government of Canada and the Long Plain First Nation resolved Long Plain's outstanding claim to treaty land entitlement in consideration for cash payments totalling $16.5 million. In exchange, the First Nation provided a release which prevents it from commencing legal proceedings against Canada to claim more land under the provisions of Treaty 1. The First Nation did, however, retain the right to claim compensation for loss of use of its treaty land entitlement shortfall for the period from 1876 to the date of the Settlement Agreement. The subject matter of this report is whether Canada is liable in law for loss of use compensation and, if so, on what basis and in what amount.

Article 2 of the Settlement Agreement deals with the instalments to be paid to Long Plain:

ARTICLE 2: FEDERAL PAYMENT

2.1 Subject to the terms of this Agreement, Canada shall provide the First Nation with a Federal Payment of $16,500,000.00, which payment, if and to the extent same comes due as hereafter provided, shall be made in two instalments.

2.2 *Within 30 days of this Agreement coming into force*, but subject to Article 14.2, *Canada shall provide the First Nation with the first instalment of the Federal Payment in the amount of $8,400,000.00*.

2.3 Subject to Article 14.2, *within 30 days of the claim of the First Nation for Loss of Use being*:

(a) settled by the parties as provided for in Article 3.3; or

(b) abandoned by the First Nation as provided for in Article 3.4; or

(c) *rejected by Canada as provided for in Article 3.5*,

Canada shall provide the First Nation with the second instalment of the Federal Payment in the amount of $8,100,000.00 (subject to any reduction as a result of Manitoba contributing land suitable to the First Nation and Canada as part of this settlement to satisfy its obligations under paragraph 11 of Schedule 1 of the *Constitution Act, 1930*), provided that such second instalment of the Federal Payment shall not be payable to the First Nation by Canada:

(d) before December 1, 1994; or

(e) at all in the event the First Nation commences legal proceedings in a court of competent jurisdiction against Canada or Manitoba seeking

> damages or other relief in respect of a claim for Loss of Use provided the decision to commence such proceeding has been ratified by the Eligible Members in accordance with the ratification procedure set out in Schedule "B" (with such amendments as the circumstances may reasonably require).[2]

Article 2.3(c) provides that Canada would be compelled to make the second payment of $8.1 million to the First Nation within 30 days of Canada rejecting the First Nation's claim. Article 3 then deals generally with the process for addressing Long Plain's loss of use claim, and, in the context of Article 2.3(c), Article 3.5 is particularly relevant because it sets forth the circumstances in which Canada is deemed to have rejected the First Nation's claim:

> **ARTICLE 3: PROCESS FOR DEALING WITH ALLEGED LOSS OF USE**
>
> 3.1 The parties affirm that it is the intent and purpose of this Agreement to achieve a full and final settlement of the matter of the amount of land to be provided to the First Nation as provided for in the [Treaty 1] Per Capita Provision [of 160 acres per family of five, or in that proportion for larger or smaller families] and all other claims relating thereto, provided that the First Nation reserves the right to consider a potential claim for Loss of Use as herein provided.
>
> 3.2 The parties undertake and agree that any claim the First Nation wishes to advance for Loss of Use shall be advanced and addressed in the manner and within the timeframe set out in this Article.
>
> 3.3 (a) On or before December 1, 1994, the First Nation may submit its claim for Loss of Use to Canada, particularised in sufficient detail as to permit Canada to review such claim on its merits.
>
> (b) Canada shall, within six months of receipt of such submission of the First Nation, review same and advise the First Nation as to whether Canada is prepared to recognise a lawful obligation to compensate the First Nation for its claim for Loss of Use.
>
> (c) In the event:

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[2] Settlement Agreement, August 3, 1994 (ICC Documents, pp. 533-35). Emphasis added. Article 14.2 referred to in Article 2 is irrelevant to these proceedings, providing that, "[n]otwithstanding any other provision of this Agreement, any obligation on the part of Canada to make any payment to, on behalf of or for the benefit of the First Nation is subject to the appropriation of sufficient funds from Parliament": p. 559.

(i) Canada recognises a lawful obligation to compensate the First Nation for its claim for Loss of Use; or

(ii) Canada refuses to recognise such a lawful obligation, the First Nation submits such claim to the ICC [Indian Claims Commission] for the purpose of seeking a recommendation on the issue of whether such lawful obligation exists, the ICC recommends Canada proceed to recognise same, and Canada accepts such recommendation

the parties shall commence negotiations within 30 days thereafter to determine the quantum of the claim of the First Nation for Loss of Use.

(d) In the event Canada is prepared to recognise a lawful obligation to compensate the First Nation for its claim for Loss of Use and the parties are unable to reach consensus as to the quantum of such claim by:

(i) June 1, 1996; or

(ii) six months after the date the ICC renders its recommendation under Article 3.3(c)(ii),

whichever date shall last occur, the First Nation may submit such claim to the ICC for the purpose of seeking a recommendation on the issue of the quantum of same.

(e) In the event Canada accepts the recommendation of the ICC on the issue of the quantum of the claim of the First Nation for Loss of Use, the parties shall conclude a settlement on that basis.

3.4 *The First Nation shall be deemed to have abandoned its claim for Loss of Use in the event the First Nation*:

(a) provides Canada with a duly executed resolution by the Council to the effect that the First Nation has abandoned same, together with evidence that such decision has been ratified by a majority of the Eligible Members of the First Nation voting, and of those voting, a majority voting in favour, of such decision in a ratification process held in accordance with the procedure set out in Schedule "B" (with such amendments as the circumstances reasonably require); or

(b) fails to submit its claim for Loss of Use to Canada particularised in sufficient detail as to permit Canada to review such claim on its merits by December 1, 1994; or

(c) *fails to submit its claim to the ICC on the issue of whether a lawful obligation on Canada to compensate the First Nation for its claim for Loss of Use exists*:

(i) within eight months of the date on which it submits its claim for Loss of Use to Canada particularised in sufficient detail as to permit Canada to review such claim on its merits, in the event Canada fails to respond to same within six months of such date; or

(ii) *within 60 days of the date Canada advises the First Nation it is not prepared to recognize a lawful obligation to compensate the First Nation for its claim for Loss of Use*; or

(d) submits its Loss of Use claim to the ICC and the ICC recommends that Canada not recognise a lawful obligation to compensate the First Nation for its claim for Loss of Use; or

(e) fails to submit the claim to the ICC on the issue of quantum within 60 days of the later of:

(i) June 1, 1996; or

(ii) six months after the date the ICC renders its recommendation under Article 3.3(c)(ii)

in the event Canada does recognise a lawful obligation to compensate the First Nation for its claim for Loss of Use but the parties are unable to reach consensus as to the quantum of such claim by the later of those two dates; or

(f) fails to submit the claim to the ICC on the issue of quantum within 60 days of Canada advising the Council that it is not prepared to accept a recommendation of the ICC under Article 3.3(c)(ii).

3.5 *Canada shall be deemed to have rejected the claim of the First Nation for Loss of Use in the event Canada*:

(a) fails to respond to the submission of the First Nation within six months of receipt of same, provided such submission is particularised in sufficient detail as to permit Canada to review such claim on its merits; or

(b) *advises the Council in writing at any time that it is not prepared to recognise a legal obligation to compensate the First Nation for its claim for Loss of Use*:

(i) *following the submission of the claim to Canada by the First Nation*; or

(ii) following the recommendation of the ICC that the claim should be accepted for negotiation in the event the First Nation makes a submission to the ICC on the merits of the claim; or

(iii) following the recommendation of the ICC on the issue of quantum in the event the First Nation makes a submission to the ICC on that issue; or

(c) fails to respond within 30 days to a recommendation of the ICC made pursuant to Article 3.3(c)(ii).[3]

Long Plain did, in fact, submit its claim for loss of use to Canada in November 1994, within the time frame contemplated by Article 3.3(a) of the Settlement Agreement. The claim was supported by an historical report entitled "A Treaty Land Entitlement Report Prepared for the Long Plain First Nation" by D.N. Sprague, a damage quantification report entitled "Evaluation of Treaty Land Entitlement: Long Plain" by Daryl F. Kraft, and legal submissions.[4]

In early 1995, Canada rejected Long Plain's claim. At that time, A.J. Gross, the Director of Treaty Land Entitlement for Indian and Northern Affairs, wrote to former Long Plain Chief Peter YellowQuill as follows:

> We have now completed our review of your claim for loss of use, submitted pursuant to our settlement agreement dated August 3, 1994. In our view you have not demonstrated a breach of lawful obligation which gives rise to damages for loss of use. Further, with respect to the quantification for damages, we believe that the Kraft report, submitted with your claim, bases its valuation conclusions on unsubstantiated assumptions and ideal, but non-factual, situations. A loss of use claim must, in our view, prove actual loss.
>
> We are prepared to meet with you to discuss our reasons for our view at your convenience. However, should you wish to expedite consideration of your claim by the ISCC [Indian Specific Claims Commission], as contemplated under the settlement agreement, you may consider this letter to be Canada's rejection of the claim under the Specific Claims Policy.
>
> As agreed, our rejection of this claim entitles your First Nation to receipt of the second instalment of your settlement monies [pursuant to Article 2.3(c) of the

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[3] Settlement Agreement, August 3, 1994 (ICC Documents, pp. 535-39). Emphasis added.

[4] Jeffrey F. Harris, Keyser Harris, Barristers & Solicitors, "Long Plain First Nation Loss of Use Claim," November 1994 (ICC Documents, pp. 1-319).

> Settlement Agreement]. I am therefore providing a copy of this letter to our Ottawa office so that the transfer of funds to your trust account may take place.[5]

Following a meeting between representatives of the First Nation and Indian Affairs, Gross wrote a further letter to Chief YellowQuill explaining how Canada had determined that "the actions of Canada's duly authorized officials were reasonable and prudent in setting aside reserve land for the Long Plain Band under the provisions of Treaty No. 1." He continued:

> In all the circumstances we do not believe that that record supports your claim. We expect that any further activity on the claim will now take place before the Indian Specific Claims Commission (ISCC).[6]

Within one week of receiving Gross's letter, the former solicitors for Long Plain corresponded with the Commission to request an inquiry into the First Nation's loss of use claim.[7] The Commission convened a planning conference on August 29, 1995, in Edwin, Manitoba, to discuss the issues with the parties, following which the Commissioners reviewed the claim on September 22, 1995, and agreed to conduct the inquiry.[8]

MANDATE OF THE COMMISSION

The Commission's mandate to conduct inquiries pursuant to the *Inquiries Act* is set out in a commission issued on September 1, 1992. That commission directs:

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5 A.J. Gross, Director, Treaty Land Entitlement, Department of Indian and Northern Affairs, to Chief Peter YellowQuill, Long Plain First Nation, February 27, 1995 (ICC Documents, p. 700).

6 A.J. Gross, Director, Treaty Land Entitlement, Department of Indian and Northern Affairs, to Chief Peter YellowQuill, Long Plain First Nation, April 5, 1995 (ICC Documents, pp. 697-99).

7 Loretta A. Meade, Keyser Harris, Barristers & Solicitors, to Kim Fullerton, Indian Claims Commission, April 12, 1995.

8 Daniel Bellegarde and James Prentice, Co-chairs, Indian Claims Commission, to Chief Peter YellowQuill and Council, Long Plain First Nation, September 25, 1995; Daniel Bellegarde and James Prentice, Co-chairs, Indian Claims Commission, to Honourable Ron Irwin, Minister of Indian and Northern Affairs, and Honourable Allan Rock, Minister of Justice and Attorney General, September 25, 1995.

> that our Commissioners on the basis of Canada's Specific Claims Policy ... by considering only those matters at issue when the dispute was initially submitted to the Commission, inquire into and report on:
>
> (a) whether a claimant has a valid claim for negotiation under the Policy where that claim has already been rejected by the Minister; and
>
> (b) which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the Minister's determination of the applicable criteria.[9]

The Specific Claims Policy is set forth in a 1982 booklet published by the Department of Indian Affairs and Northern Development entitled *Outstanding Business: A Native Claims Policy – Specific Claims*.[10] In considering a specific claim submitted by a First Nation to Canada, the Commission must assess whether Canada owes an outstanding "lawful obligation" to the First Nation in accordance with the following clear statement of Policy in *Outstanding Business*:

> The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary.[11]

The Specific Claims Policy itself defines "lawful obligation" in this manner:

> **1) Lawful Obligation**
>
> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., an obligation derived from the law on the part of the federal government.
>
> A lawful obligation may arise in any of the following circumstances:
>
> i) The non-fulfillment of a treaty or agreement between Indians and the Crown.
> ii) A breach of obligation arising out of the Indian Act or other statutes pertaining to Indians and the regulations thereunder.

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[9] Commission issued September 1, 1992, pursuant to Order in Council PC 1992-1730, July 27, 1992, amending the Commission issued to Chief Commissioner Harry S. LaForme on August 12, 1991, pursuant to Order in Council PC 1991-1329, July 15, 1991 (Consolidated Terms of Reference).

[10] Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy – Specific Claims* (Ottawa: Minister of Supply and Services, 1982), reprinted (1994) 1 ICCP 171 (hereafter *Outstanding Business*).

[11] *Outstanding Business*, 19; reprinted (1994) 1 ICCP 171 at 179.

iii) A breach of an obligation arising out of government administration of Indian funds or other assets.

iv) An illegal disposition of Indian land.[12]

To assist Indian bands and associations in the preparation of their claims, the government has also prepared "guidelines" relating to the submission and assessment of specific claims and to the treatment of compensation. These guidelines have been incorporated into *Outstanding Business*, with the following guidelines being particularly germane to the present inquiry:

> **COMPENSATION**
>
> The following criteria shall govern the determination of specific claims compensation:
>
> 1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. *This compensation will be based on legal principles.*
>
> ...
>
> 3) (i) *Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority,* the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.
>
> (ii) *Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.*[13]

THE COMMISSION'S INQUIRY PROCESS

The Planning Conferences and the Joint Statement of Agreed Facts

During the course of this inquiry, the Commission convened three planning conferences in an effort to settle the loss of use claim or, failing that, to define the scope of the inquiry and narrow the issues in dispute. The first planning conference was held on August 29, 1995, at the school on the Long Plain reserve, at which time the First Nation provided a statement of the issues and its position. At that meeting, it became clear that, from Canada's perspective, the August 3, 1994, settlement of Long

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12 *Outstanding Business*, 20; reprinted (1994), 1 ICCP 171 at 179.

13 *Outstanding Business*, 30-31; reprinted (1994), 1 ICCP 171 at 184. Emphasis added.

Plain's treaty land entitlement had been based on the so-called "equity formula," which the First Nation considered artificial, inappropriate, and – in light of the much higher compensation to which the First Nation believed it would be entitled under a loss of use analysis – inadequate. Canada took the position that, although it did not recognize loss of use as the basis for a claim for damages, it nevertheless considered that the $16.5 million paid under the Settlement Agreement would be sufficient to compensate Long Plain for loss of use in any event.[14] Canada later provided its own statement of the issues and its position in a letter dated October 11, 1995.[15]

The second planning conference was convened in Ottawa on December 9, 1996, following the selection of new legal counsel for the First Nation as well as the election of subsequent Chief Marvin Daniels and a new Band Council. In preparation for that conference, counsel for the First Nation prepared a revised statement of the issues to be dealt with at the inquiry. The meeting was held subject to notice being taken of an objection raised by former Chief YellowQuill regarding the status of the First Nation's legal counsel and its newly elected Band Council.[16]

At the third planning conference in Ottawa on February 14, 1997, the process of the inquiry and the Commission's mandate were further clarified:

> The parties had discussed whether loss of use was a separate claim or a head of compensation. The [Settlement] agreement contemplated a two-step procedure, first, consideration of the "validity" of the loss of use claim, and, second (potentially) into compensation. It appeared that the process contemplated by the Agreement must govern. Thus, the first step would be to put before the Commission the issue of validity of a claim for loss of use, without any request for findings of fact. The Commission would be requested not to make findings of fact and to limit its review to the circumstances and principles governing the inclusion of compensation for loss of use in TLE [treaty land entitlement] claims, and whether it was payable in connection with the TLE claim covered by the Agreement. It was accepted, however,

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[14] Indian Claims Commission, Planning Conference, Long Plain First Nation Treaty Land Entitlement (Loss of Use), August 29, 1995.

[15] Bruce Becker, Counsel, Department of Justice, Specific Claims West, DIAND Legal Services, to Kathleen Lickers, Associate Counsel, Indian Claims Commission, October 11, 1995.

[16] Indian Claims Commission, Planning Conference, Long Plain First Nation Treaty Land Entitlement, December 9, 1996.

> that some factual background was essential to an understanding of the validity issue, and the parties agreed to proceed by way of an Agreed Statement of Facts.[17]

On the basis of this agreement, the parties prepared and submitted the Joint Statement of Agreed Facts which forms the primary substance of the historical background comprising Part II of this report.

The Inquiry

Between the time of the First Nation's initial contact with the Commission on April 12, 1995, and the third planning conference on February 14, 1997, the parties tendered eight exhibits comprising approximately 700 pages of historical documentation and expert evidence, including among other things the Settlement Agreement, Long Plain's claim submission of November 1994, the Sprague and Kraft reports, and a critique of the Sprague report by Jim Gallo, Indian Affairs' Manager of Treaty Land Entitlement and Claims for the Manitoba Region.[18] However, the parties subsequently agreed that the inquiry would be expedited by placing the Joint Statement of Agreed Facts before the Commission and asking it to address the single issue of whether compensation for loss of use is available in the treaty land entitlement context. Ultimately, the Joint Statement of Agreed Facts was prepared by counsel for the First Nation and executed by Chief Marvin Daniels for the Long Plain First Nation on July 25, 1997, under authority of a Band Council Resolution dated July 24, 1997.[19] On behalf of Canada, counsel for Canada executed the Joint Statement of Agreed Facts on August 8, 1997.

Counsel for Long Plain submitted written arguments to the Commission on August 27, 1997, to which counsel for Canada replied on September 26, 1997. The First Nation delivered rebuttal

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17 Indian Claims Commission, Third Planning Conference, Long Plain First Nation Treaty Land Entitlement Loss of Use Claim, Revised Summary, February 14, 1997.

18 Jim Gallo, Manager, Treaty Land Entitlement and Claims, Indian and Northern Affairs Canada, Manitoba Region, "Long Plain Treaty Land Entitlement Loss of Use Claim: Review and Comments on D.N. Sprague's Historical Report," January 23, 1995 (ICC Documents, pp. 321-518).

19 Long Plain First Nations Tribal Council, Band Council Resolution 97-72, July 24, 1997 (ICC Exhibit 3).

arguments on October 8, 1997, and the parties presented oral submissions at a final session in Winnipeg on October 17, 1997.

A complete summary of the written submissions, documentary evidence, transcripts, and the balance of the record in this inquiry is set forth in Appendix A of this report.

PART II

HISTORICAL BACKGROUND

THE JOINT STATEMENT OF AGREED FACTS

The Joint Statement of Agreed Facts on which the Commission has been expressly directed to rely is now reproduced in its entirety.

JOINT STATEMENT OF AGREED FACTS

LONG PLAIN FIRST NATION TREATY LAND ENTITLEMENT LOSS OF USE CLAIM

1. On August 3, 1994 Canada and the Long Plain Band entered into an agreement concerning the settlement of the Treaty Land Entitlement claim of the Long Plain Band. This agreement, the *Treaty Land Entitlement Settlement Agreement*, provides in Article 3.1 that:

> The parties affirm that it is the intent and purpose of this Agreement to achieve a full and final settlement of the matter of the amount of land to be provided to the First Nation as provided for [in] the Per Capita Provision and all other claims relating thereto, provided that the First Nation reserves the right to consider a potential claim for Loss of Use as herein provided.

2. The *Treaty Land Entitlement Settlement Agreement* goes on in Article 3 to provide the process whereby any claim for loss of use brought by the Long Plain Band would be assessed by Canada under its Specific Claims Policy and, if not accepted for negotiations under that Policy, by the Indian Claims Commission. Canada has rejected the loss of use claim of the Long Plain Band under the Specific Claims Policy.

3. Treaty 1, a true copy of which is attached hereto as Schedule "A" to the Joint Statement of Agreed Facts, provided in part as follows:

> and for the use of the Indians of whom Oo-za-we-kwun is Chief, so much land on the south and east side of the Assiniboine, about twenty miles above the Portage. as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families, reserving also a further tract enclosing said reserve to comprise an equivalent to twenty-five square miles of equal breadth,

4. By virtue of Article 2 of the Revision to Treaty No. 1 of June 20, 1876, the Portage Band was divided into two bands. These two new Bands were the Long Plain or Short Bear Band and the Swan Lake or the Yellowquill Band:

> "Owing to the size of the said original Band, and the divisions existing amongst the Indians composing it, the said Band is divided into two

> Bands, namely the Band of those who adhere to Oo-za-we-kwun and the Band of those who adhere to Short Bear."

The same document recognized the White Mud River or Sandy Bay community as a new Band.

5. Article 3 of the June 20, 1876 Revision to Treaty No. 1, a copy of which is attached hereto as Schedule "B" to this Joint Statement of Agreed Facts, also provided that:

> "... and inasmuch, [as] by the said Treaty the Reserve to be allotted to the original Band, was one hundred and sixty acres [of land] for each family of five, or in that proportion for larger or smaller families, together with a tract enclosing the same equivalent to twenty-five square miles of equal breadth, it is hereby agreed that the separate reserves to be granted to the said three Bands, shall contain an amount of land equal to that stipulated to be given to the original Band, and such land shall be assigned [to] each Band in proportion to their relative numbers..."

6. Article 3 of the June 20, 1876 Revision to Treaty No. 1 further provided that the reserve for Short Bear's Band would be "on the north bank of the Assiniboine River, in the vicinity of Long Plain."

7. Short Bear selected the site of [the] Long Plain reserve in July 1876 and J. Lestock Reid, D.L.S., located same in township 9 and 10, range 8, west of the principal meridian.

8. In his report of November 1876 to Surveyor General J.S. Dennis, a true copy of which is attached hereto as Schedule "C" to this Joint Statement of Agreed Facts, Reid states that the population statistics used for Swan Lake and White Mud River were 179 (36 families of 5) and 183 (37 families of 5) respectively. He noted that he used two formula[e] to calculate the size of the reserves: the 160 acre per family of five for the "homestead" area and 143 acres per family of five for the distribution of each band's share of the "25 square miles". No numbers for Long Plain are listed, but by inference from the population figures from the two other Bands and the 143 acres per family reference, Reid may have used a statistic of 197 (39 families of 5) to compute the size of the Long Plain reserve.

9. The number of people paid treaty annuities [on] June 20, 1876 with Chief Short Bear was 209. The reserve as selected by Short Bear and located by J. Lestock Reid and referred to in Order in Council No. 2876 of November 21, 1913 contained an area of 10,880 acres.

10. Canada delivered to Long Plain a letter from the Minister, then the Honourable John Munro dated the 5th day of November, 1982 accepting the Band's claim of an outstanding treaty land entitlement for negotiations under the Government

of Canada's Claims Policy, "Outstanding Business: A Native Claims Policy", a true copy of which is attached hereto as Schedule "D" to this Joint Statement of Agreed Facts.

11. Canada says research and analysis of the Long Plain treaty annuity lists and Band memberships records, conducted by the Manitoba Regional Office of the Department of Indian Affairs, Lands & Trusts section during 1991 and 1992, suggests that the population of the Long Plain Band at the time of the selection and location of the reserve was 223. This number was composed of 209 people paid annuities on June 20, 1876; 15 people subsequently paid arrears for that date and 3 people who were absent but not paid arrears for that date, less 4 people previously counted for land with another band.

12. The Long Plain Band's *Loss of Use Claim* of November, 1994 relies on a population statistic of 350 as the total number of the Band for treaty land entitlement purposes. This number is derived from a population statistic reported in the newspaper *The Manitoban* on August 3, 1871:

> **"Lower Fort Garry, July 28, 1871**
> **THE INDIAN REPRESENTATIVES**
>
> The first business which came up was the presentation of those who were to carry on the negotiations on behalf of the tribe and to [be] responsible for them. They were named as follows: – Yellow Quill, a Chief from the Portage, first presented himself. He said his band numbered 1,000 present 326."

13. For the purposes of *The Treaty Land Entitlement Settlement Agreement* negotiations, the parties agreed that [the] Long Plain reserve referred to in Order in Council 2876 of November 21, 1913 consisted of 10,880 acres, of which 5,577 acres were agreed for purposes of negotiations to be attributable to Long Plain's share of the 25 square mile promise in the Treaty calculated as 143 acres per family of five by the 39 families inferentially used by Reid as the basis of calculation. The *Treaty Land Entitlement Settlement Agreement* addressed only the issue of the per capita entitlement that the Long Plain Band was entitled to by virtue of Treaty No. 1 of 1871 and its Revision in 1876 and not its proportionate share of the 25 square miles.

14. Hence, the parties agreed for purposes of The Treaty Land Entitlement Settlement Agreement negotiations that 5,303 acres of the reserve were attributable to the per capita clause (10,880 - 5,577 = 5,303).

15. Canada calculates the shortfall as of the date of the selection and location of the Long Plain reserve to be 1,833 acres: 223 Band members multiplied by 32 acres (per capita allotment under Treaty 1) less per capita lands received (32 x 223 = 7,136 acres - 5,303 received = shortfall of 1,833 acres).

16. The Long Plain Band calculates the shortfall as 5,897 acres (*Loss of Use Claim*, p. 4).

17. The population of the Long Plain Band as listed on the base pay list for each year declined after 1876 commencing 1877 when the pay list number was 189. The population listed on the pay lists declined further from there, reaching a low of 110 in 1902 and 1916. It was not until 1934 that the base pay list for the Long Plain Band reached its former level of 209 (it was 213 in that year). Attached hereto as Schedule "E" to this Joint Statement of Agreed Facts, is a chart showing the base pay list numbers from 1876 until 1955.

18. In response to an undertaking by Canada to deliver to the Claimant Band "all documents identifying Government policy regarding loss of use in the Treaty Land Entitlement Context", Canada submitted one document as of the date hereof being a letter from Anne-Marie Robinson, Director of Policy and Research, Specific Claims Branch, to the Claimant's solicitor, Rhys Wm. Jones dated July 23, 1997, attached hereto as Schedule "F" to this Joint Statement of Agreed Facts.

19. During the course of negotiation of the Canada–Long Plain Treaty Land Entitlement Agreement of August 3, 1994, Canada delivered to the Band the following correspondence, originals or true copies of which are attached hereto and scheduled as follows:

December 17, 1992	Balfour to Yellowquill	Schedule "G"
February 23, 1993	Gross to Yellowquill	Schedule "H"
March 18, 1993	Hilchey to Yellowquill	Schedule "I"
April 19, 1993	Hilchey to Yellowquill	Schedule "J"
September 3, 1993	Gallagher to Yellowquill	Schedule "K"
September 24, 1993	Browes to Yellowquill	Schedule "L"

20. In response to the First Nation's submission pursuant to Article 3 of the Canada–Long Plain TLE Settlement Agreement, that it was entitled to compensation for Loss of Use, Canada rejected same with explanation as contained in two letters addressed to the First Nation dated February 27, 1995 and April 5, 1995 both from A.J. Gross to then Chief Peter Yellowquill, true copies of which are attached hereto as Schedules "M" and "N" respectively to this Joint Statement of Agreed Facts.

The parties hereto jointly agree that the Indian Claims Commission, may for purposes of this inquiry alone, take the above facts to be true.[20]

One aspect of the Joint Statement of Agreed Facts requires further discussion.

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[20] Joint Statement of Agreed Facts, Long Plain First Nation Treaty Land Entitlement Loss of Use Claim, August 8, 1997 (ICC Exhibit 2).

THE SHORTFALL ACREAGE

For the purposes of the first stage of this inquiry, the Commission has been directed to proceed on the basis that there was a shortfall in Canada's provision of treaty land to the Long Plain First Nation. The quantum of that shortfall is, for current purposes, not relevant. It is, however, worth noting the divergent positions of the parties on this question.

Canada's basis for calculating the quantum of the shortfall acreage is set forth in paragraph 15 of the Joint Statement of Agreed Facts and requires no further explanation. Long Plain's figure is less obvious. In its November 1994 loss of use claim, the First Nation contended that, based on the annuity paylists, 35 percent of the 1000 people under Chief Oo-za-we-kwun as reported in the *Manitoban* on August 3, 1871, or 350 individuals, belonged to that faction of the Band that eventually aligned itself under Short Bear. Multiplying that population by the Treaty 1 formula of 32 acres per person resulted in a treaty land entitlement of 11,200 acres, less the 5303 acres already received, resulting in a shortfall of 5897 acres.[21] Ultimately, under the terms of the 1994 Settlement Agreement, the parties agreed that, to calculate the compensation due to the First Nation for its treaty land entitlement claim, the shortfall would be pegged at 1877 acres.[22] How this figure was determined is not clear.

It is important to note that the parties have expressly agreed not to be bound by the figure of 1877 acres that they negotiated as the applicable shortfall for treaty land entitlement purposes. In that regard Article 3.7 of the Settlement Agreement provides:

> 3.7 The payment of the Federal Payment by Canada and the acceptance of same by the First Nation shall be without prejudice to the positions either may advance with respect to the Loss of Use claim and, without limiting the generality of the foregoing, Canada shall be free to argue that no such claim exists or, in the alternative that such claim, if it exists, should properly be based on the First Nation not receiving an additional 1,877 acres to which it was entitled under the Per Capita Provision in 1876.[23]

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21 Jeffrey F. Harris, Keyser Harris, Barristers & Solicitors, "Long Plain First Nation Loss of Use Claim," November 1994 (ICC Documents, p. 6).

22 Settlement Agreement, August 3, 1994 (ICC Documents, pp. 539-40).

23 Settlement Agreement, August 3, 1994 (ICC Documents, pp. 539-40). It is not clear how the shortfall figure of 1877 acres was calculated in light of Canada's position that the shortfall was 1833 acres and Long Plain's position that the number should be 5897. Nevertheless, it appears that the 1877 figure formed the basis of the

Thus, although the parties agreed to accept the negotiated shortfall of 1877 acres for the purposes of argument in this first stage of the loss of use inquiry, counsel for Long Plain made it clear in a letter to the Commission that neither party was to be held to this figure should a second hearing to quantify damages be required:

> Further to the hearing held by the Commissioners in Winnipeg on Friday, October 17, 1997 in the above matter, our client has asked us to reinforce the point made in the [Joint] Statement of Agreed Facts that for purposes of this inquiry the Commission could proceed on the factual agreement that there was a 1877 acre shortfall but that this does not bind the First Nation in relation to a second hearing. That is, the Commissioners could proceed to determine what rules govern appropriate compensation on the assumption that there was a shortfall and that for purposes of the first hearing and the first hearing only there was agreement that the Commissioners could assume the shortfall was 1877 acres. The actual shortfall is a matter of debate as between [the] Long Plain First Nation and Canada and will be dealt with in the context of the second inquiry. Indeed, Canada has likewise reserved the right to argue in the context of a second inquiry that there is no shortfall.[24]

As the Commission understands the Settlement Agreement and the stated position of the First Nation, it is the *fact* of the shortfall, to which the parties have agreed for present purposes, and not the *extent* of the shortfall that is relevant at this stage of the inquiry. As the parties have requested, we make no finding on either issue at this time.

We turn now to the issue be considered by the Commission.

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negotiated resolution of the treaty land entitlement claim under the Settlement Agreement.

[24] Rhys Wm. Jones, Lofchick Jones & Associates, to Thomas Gould, Counsel, Indian Claims Commission, November 18, 1997.

PART III

ISSUE

The parties are agreed that this inquiry is concerned with just one issue of law:

> **Is a band with an admitted shortfall in its treaty land entitlement entitled to be compensated for its loss of use of the shortfall based on the compensation criteria within the Specific Claims Policy?**

Our analysis follows.

PART IV
ANALYSIS

The case before us concerns the extent to which a First Nation may seek compensation in circumstances in which Canada has failed to provide that First Nation with its full entitlement to land under the terms of treaty. Such cases are known as treaty land entitlement claims, and at issue in these proceedings is the First Nation's claim that "loss of use" is a particular head of damage that logically flows from an outstanding lawful obligation owed by Canada to the Band. The term "loss of use" encompasses those claims that arise when a band does not receive the quantum of land expressed in the treaty until 50, 100, or, as in this case, 118 years after the consummation of that document.

Whether a band with an admitted shortfall in its treaty land entitlement is entitled to be compensated for the loss of use of the shortfall acreage turns initially on Canada's Specific Claims Policy, which is itself based upon the concepts of "lawful obligation" and "legal principle." The specific legal question with which we are concerned, however, is Canada's liability in circumstances in which the appropriate quantum of land was not, for any of a number of reasons, set aside for the use and benefit of the band. Is the government merely responsible to deliver up the remainder of the full land entitlement, or does its obligation extend, in law, to include compensatory damages or restitutionary compensation that follow from the government's delay? Other related legal issues also arise. To what extent do common law principles, such as foreseeability, remoteness, causation, and mitigation, apply? Is the nature of the Crown's conduct, whether good or bad, germane to the questions of liability and quantum?

From these questions it can be seen that the single legal issue in this inquiry as framed by Long Plain and Canada features aspects relating to, first, Canada's *liability* arising from the failure to provide the First Nation with its full measure of treaty land, and, second, in general terms, the *quantum* of compensation to which the First Nation will be entitled should liability be established for its "loss of use" of the shortfall land. The first part of our analysis will address the liability issue, followed by our review and recommendations on the question of compensation.

LIABILITY FOR LOSS OF USE OF THE SHORTFALL LAND

The Nature of Loss of Use

Generally speaking, loss of use in the context of a treaty land entitlement claim encompasses compensatory or restitutionary claims advanced by a band because its full entitlement to reserve land was not allotted at the required time. We note parenthetically that loss of use claims can also arise in circumstances where a band's lands have been improperly surrendered to the Crown or have been otherwise taken by the Crown without legal authority.

The parties in this case have specifically reserved the First Nation's right to advance a claim for loss of use under Article 3.1 of the 1994 Settlement Agreement, and they have outlined in a general way the broad parameters of the phrase "loss of use" in Article 1.1(f):

> **ARTICLE 1: DEFINITIONS**
>
> 1.1 In this Agreement: ...
>
> (f) "Loss of Use" means all claims of whatever kind or nature whatsoever the First Nation has had, has now, or may hereafter have relating to or arising from the fact that the Portage Band, the First Nation, and the other successors to the Portage Band did not receive the remaining land to which it was [sic] or any members of the First Nation were entitled under the Per Capita Provision....[25]

To place this definition in its proper context, it is also necessary to recite the Per Capita Provision of the Settlement Agreement, as set forth in Article 1.1(j):

> (j) "Per Capita Provision" means the following provision contained in Treaty No. 1:
>
> "And Her Majesty the Queen hereby agrees and undertakes to lay aside and reserve for the sole and exclusive use of the Indians the following tracts of land, that is to say:
>
> ... for the use of the Indians of whom Oo-za-we-kwun is Chief, so much land on the south and east side of the Assiniboine, about twenty miles above the Portage, as will furnish one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families ... it being understood,

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[25] Settlement Agreement, August 3, 1994 (ICC Documents, pp. 528 and 530).

> however, that if, at the date of the execution of this treaty there are any settlers within the bounds of any lands reserved by any band, Her Majesty reserves the right to deal with such settlers as She shall deem just, so as not to diminish the extent of the land allotted to the Indians"
>
> and the following provision of the revision to Treaty No. 1 made on or about June 20, 1876:
>
> "and it is further agreed that a Reserve shall be assigned to the Band, of which Short Bear is Chief, by Her Majesty's said Commissioner or special Commissioner on the north side of the Assiniboine River, in the vicinity of the Long Plain ...
>
> ... it is hereby agreed that the separate Reserves to be granted to the said three Bands shall contain an amount of land equal to that stipulated to be given to the original Band, and such land shall be assigned to each Band in proportion to their relative numbers so that each Band shall receive their fair and just share of the said land ..."[26]

These provisions establish the content of Long Plain's claim. It can be seen that loss of use is defined very broadly and includes any claim the First Nation might have as a result of Canada's failure to provide it with its full measure of reserve land, whether under (a) the Treaty 1 formula of 160 acres for each family of five, or (b) the terms of the 1876 revision relating to the proportional allocation among Yellow Quill, Short Bear, and the White Mud people of the 25 square mile area referred to in Treaty 1. The Commission has not received any representations regarding whether this latter 25 square mile area was properly allocated, and therefore we make no comment on this issue at this time.

The Specific Claims Policy

The initial question, then, is whether loss of use claims are compensable under the federal government's Specific Claims Policy of 1982, entitled *Outstanding Business*.

This Commission has had many years of experience in the interpretation of the Specific Claims Policy and would observe that the wisdom of the Policy flows from its reliance upon the concept of "lawful obligation." The Policy is, in fact, constructed upon lawful obligation as that concept has

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[26] Settlement Agreement, August 3, 1994 (ICC Documents, p. 532).

evolved and continues to evolve through the process of judicial determination in Canada. Describing itself as "A Renewed Approach to Settling Specific Claims," the Policy in its opening paragraphs emphasizes the central importance of lawful obligation:

> The government has clearly established that *its primary objective with respect to specific claims is to discharge its lawful obligation* as determined by the courts if necessary.[27]

As we have seen, the Policy carries on to state:

> **1) Lawful Obligation**
>
> The government's policy on specific claims is that it will recognize claims by Indian bands which disclose an outstanding "lawful obligation," i.e., *an obligation derived from the law on the part of the federal government.*[28]

Outstanding Business also incorporates certain compensation "guidelines" within the Specific Claims Policy. The two that we have identified as relevant to these proceedings are paragraphs 1 and 3:

> **COMPENSATION**
>
> The following criteria shall govern the determination of specific claims compensation:
>
> 1) As a general rule, a claimant band shall be compensated for the loss it has incurred and the damages it has suffered as a consequence of the breach by the federal government of its lawful obligations. *This compensation will be based on legal principles.*
>
> ...
>
> 3) (i) *Where a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority,* the band shall be compensated either by the return of these lands or by payment of the current, unimproved value of the lands.

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27 *Outstanding Business*, 19; reprinted (1994), 1 ICCP 171 at 199. Emphasis added.

28 *Outstanding Business*, 20; reprinted (1994), 1 ICCP 171 at 180. Emphasis added.

> (ii) *Compensation may include an amount based on the loss of use of the lands in question, where it can be established that the claimants did in fact suffer such a loss. In every case the loss shall be the net loss.*[29]

In the Commission's view, we must establish in this inquiry whether loss of use constitutes a "lawful obligation" within the meaning of *Outstanding Business*. As paragraph 1 of the compensation guidelines suggests, whether such a lawful obligation exists is a question to be determined in accordance with Canadian "legal principles."

Before addressing these legal principles, however, we feel obliged to address briefly, as a subsidiary point, the effect of paragraph 3 of the "compensation guidelines" in the Specific Claims Policy. Arguably, since paragraph 3 of the guidelines relates to circumstances in which "a claimant band can establish that certain of its reserve lands were never lawfully surrendered, or otherwise taken under legal authority," it may not apply at all to the circumstances of this case: the lands with respect to which Long Plain claims compensation for loss of use were neither unlawfully surrendered nor taken without legal authority – they were never provided to Long Plain in the first place. However, it remains to be considered whether, by specifically providing that compensation for loss of use may be payable where reserve lands were unlawfully surrendered or taken without legal authority, the drafters of *Outstanding Business* intended that loss of use would *not* be compensable in other circumstances. This is the principle of interpretation referred to as *expressio unius est exclusio alterius* ("to express one thing is to exclude the other").

Canada has not addressed paragraph 3 of the compensation guidelines in its submissions. Similarly, Long Plain has not referred to this guideline expressly, although in its rebuttal submissions it argues:

> The Claimant also submits that the Band should not be in a worse position than if the land had been the corpus of a trust and [had been] lost through the careless conduct or reckless disregard of duty by a Trustee. In such a case, the beneficiaries would be entitled to restoration of the corpus of the trust and compensation reflecting its [sic] opportunity losses on a theoretical highest and best [use] basis. The only thing that distinguishes the one from the other is that in the latter the land is given and then lost

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[29] *Outstanding Business*, 30-31; reprinted (1994), 1 ICCP 171 at 184. Emphasis added.

> through the trustee's breach whereas in the former the breach precedes and causes the loss. In the end, **the loss to the beneficiary is the same**.[30]

Similarly, during oral argument, counsel for the First Nation stated:

> I for the life of me can't figure out why a band should be entitled to more compensation if its lands are taken illegally than if it never receives the land in the first place under what I regard as specious argument that because there's no fixed date for the provision of treaty land, Canada is under no obligation to provide it at any given date, therefore there can be no loss of use, and frankly we [Canada] could give you the 1,877 acres today, and we would not be in breach of the treaty.[31]

Other than these limited statements, each party framed its arguments on the basis that the question must be determined within the general legal principles contemplated in paragraph 1.

We agree. In our view, paragraph 3 does not apply to the facts of this case because it refers only to situations in which reserve lands were unlawfully surrendered or taken without legal authority.

Part Three of the Specific Claims Policy, in which paragraph 3 is found, is, in any event, simply entitled "Guidelines." The use of that term suggests to us that, as a guideline, paragraph 3 is intended to be interpretive only. In fact, the introductory paragraph to the "Guidelines" suggests as much:

> In order to assist Indian bands and associations in the preparation of their claims the government has prepared guidelines pertaining to the submission and assessment of specific claims and on the treatment of compensation. While *the guidelines form an integral part of the government's policy on specific claims*, they are set out separately in this section for ease of reference.[32]

The "Guidelines" represent statements of policy and do not purport to define in an exhaustive manner the "legal principles" upon which compensation is to be determined. As noted previously, the wisdom and strength of the Specific Claims Policy is derived from its clear reliance upon "lawful obligation"

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30 Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, pp. 19-20. Emphasis in original.

31 ICC Transcript, October 17, 1997, p. 105 (Rhys Jones)

32 *Outstanding Business*, 29; reprinted (1994), 1 ICCP 171 at 183. Emphasis added.

as an evolving concept. In circumstances in which an analysis of the law leads to a clear conclusion that "loss of use" may be claimed as part of the "lawful obligation" owed by Canada to a First Nation, we are not prepared to elevate the "Guidelines" in *Outstanding Business* – especially ones of uncertain application such as paragraph 3 – to a position where they will override the clear application of the Specific Claims Policy.

We turn now to the question of Canada's lawful obligation in this case.

The Legal Principles Underlying Lawful Obligation

Assuming then that a treaty land entitlement shortfall exists, does a claim for loss of use follow? Does loss of use constitute a valid lawful obligation?

In an effort to persuade the Commission that loss of use *does* constitute a valid lawful obligation, counsel for Long Plain has devoted considerable time and energy to characterizing Canada's failure to provide the First Nation with its full measure of treaty land as a breach of fiduciary duty. According to counsel for Canada, the reasons why it is important to the First Nation to characterize Canada's duty in this case as fiduciary are, first, to make any breach of the duty "readily discernible," since the higher standard of duty required of a fiduciary will be imposed, and, second, to import equitable principles regarding the assessment of damages.[33] However, we do not agree that a breach of fiduciary duty represents the only basis of liability in the event of a treaty land entitlement shortfall. As for the argument that it is necessary to characterize Canada's duty as fiduciary to permit the Commission to import equitable principles to the assessment of damages, we also do not agree, as we will discuss later, that the remedies available to the First Nation are dictated by such a characterization of the breach.

In our view, Canada's failure to provide a band with its full treaty land entitlement gives rise to lawful obligations to make up the shortfall and to compensate the band for loss of use. There are three possible bases in law for such a conclusion. We have considered each of these. First, Canada's failure to deliver the band's entire land entitlement may be said to be a breach of the terms of the treaty itself. Second, it is arguable that this failure is also a violation of the general trust-like

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33 Submissions on Behalf of the Government of Canada, September 26, 1997, pp. 10-11.

responsibilities that Canada owes First Nations in respect of matters concerning Indian title, and is therefore a breach of fiduciary duty. Third, Canada's conduct giving rise to the shortfall may, in certain cases, substantiate a separate cause of action based upon breach of fiduciary duty.

Breach of Treaty

Although it may be said that the relationship between Canada and First Nations is fiduciary in nature, we consider that, in the context of treaty land entitlement, Canada's *primary* obligation to First Nations arises not from the fiduciary nature of the relationship, but rather from the fact that the people of Canada, as represented by their government, entered into a solemn treaty relationship with these aboriginal people. Canada as a party to that relationship has an obligation to live up to the terms of the treaty. In our view, it is without question that such treaty covenants are of sufficient importance in modern Canadian society that they stand on their own as *sui generis* obligations independent of the concept of fiduciary obligation for their legitimacy or enforceability. To suggest that the treaties are reliant on the vehicle of fiduciary duty to make them enforceable would fail to accord them the historical and constitutional importance that they have acquired in Canada. In our view, the treaties are fundamental in defining the nature of the relationship between the Crown and aboriginal people.

This treatment of the treaty as the primary source of Canada's lawful obligation to First Nations in the treaty land entitlement context is consistent with earlier statements of principle by this Commission. In December 1995, while addressing the Fort McKay First Nation's argument that Canada had committed a "fundamental and blatant" breach of fiduciary obligation by unilaterally changing its policy regarding individuals entitled to be counted in quantifying treaty land entitlement, the Commission stated:

> We begin with the proposition that treaty and fiduciary obligations overlap, in that *the Crown has a fiduciary duty to live up to its treaty obligations*. It seems to us, however, that the question of breach of treaty comes first, and that it subsumes these further questions. In other words, the issue is not whether Canada "chose" to interpret the treaty in a manner that restricts the entitlement of First Nations and thus improperly exercised its "discretion," or whether Canada is treating First Nations signatories to the treaty unequally, but whether Canada's interpretation of the treaty is correct. If it is not, and the treaty land entitlement has not been met, then the

> conclusion of this inquiry will be that Canada has an outstanding lawful obligation towards the Fort McKay First Nation.[34]

Three months later, the Commission treated Canada's failure to include "late additions" to a band's population – including new adherents to treaty and transferees from landless bands – for treaty land entitlement purposes as a breach of Canada's obligations under treaty. In its report on the claim of the Lac La Ronge Indian Band, the Commission stated:

> Canada's failure to provide the full land entitlement at date of first survey, or subsequently to provide sufficient additional land to fulfil any new treaty land entitlement arising by virtue of "late additions" joining the band after first survey, constitutes a breach of the treaty and a corresponding breach of fiduciary obligation.[35]

The Commission endorsed this principle in its later reports on the treaty land entitlement claims of the Kahkewistahaw and Kawacatoose First Nations.[36]

Canada's assumption of the obligation or undertaking to deliver the full quantum of land required under the terms of the treaties must be viewed as integral to the treaty relationship. It is to be remembered that the very purpose of the treaties was to quiet aboriginal title in exchange for a specified quantum of land that Canada was to set aside at a band's request. Indeed, reserve lands constituted the very *res* of the treaties, and the failure to deliver a band's full entitlement within a reasonable time of being asked to do so must be considered a significant breach capable of attracting remedies in both law and equity.

We find support for this conclusion in Chief Justice Lamer's comments on the implications of the *sui generis* nature of Indian land rights in the context of a surrender claim in *St. Mary's Indian Band v. City of Cranbrook*:

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[34] Indian Claims Commission. *Fort McKay First Nation Treaty Land Entitlement Inquiry* (1996), 5 ICCP 3 at 57. Emphasis added.

[35] Indian Claims Commission. *Lac La Ronge Indian Band Treaty Land Entitlement Inquiry* (1996), 5 ICCP 235 at 318.

[36] Indian Claims Commission. *Kahkewistahaw First Nation Treaty Land Entitlement Inquiry* (1998), 6 ICCP 21 at 77; Indian Claims Commission. *Kawacatoose First Nation Treaty Land Entitlement Inquiry* (1996), 5 ICCP 73 at 183.

> I want to make it clear from the outset that native land rights are *sui generis*, and that nothing in this decision should be construed as in any way altering that special status. As this Court held in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321, *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, 53 D.L.R. (4th) 487, and *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, 130 D.L.R. (4th) 193, native land rights are in a category of their own, and as such, traditional real property rules do not aid the Court in resolving this case.
>
> But what does this really mean? As Gonthier J. stated at paras. 6 and 7 in *Blueberry River*, *supra*, it means that *we do not approach this dispute as would an ordinary common law judge*, by strict reference to intractable real property rules.... [W]e do not focus on the minutiae of the language employed in the surrender documents and should not rely upon traditional distinctions between determinable limitations and conditions subsequent in order to adjudicate a case such as this. Instead, *the Court must "go beyond the usual restrictions" of the common law* and look more closely at the respective intentions of the St. Mary's Indian Band and the Crown at the time of the surrender of the airport lands.[37]

In this context, it seems clear that a claim by an Indian band with regard to a shortfall in the allocation of its reserve lands should constitute an enforceable *sui generis* obligation. It is our view that, at law, such claims are clearly on a higher plane than contractual obligations, but even if they are not, they should still attract the intervention of the courts of equity. We have no doubt that the *sui generis* treaty obligation, being equitable in nature, can be enforced by the courts, either through an award of specific performance or, in circumstances in which specific performance may not be available, an award of, first, compensatory damages in lieu of the shortfall land, and, second, compensatory damages for late performance. One way – although not the only way – of measuring the latter form of damages is by means of a loss of use analysis. Ultimately, regardless of whether we conclude that the shortfall in the present case amounts to a breach of fiduciary duty or a breach of treaty, Canada's lawful obligation will be measured as the compensation or damages a court could award under general principles of law and equity.

That being said, however, we wish to be clear that we have based our conclusion in this report on our finding that Canada's failure to deliver up the proper quantum of reserve land amounts, in law, to a breach of treaty.

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[37] *St. Mary's Indian Band v. City of Cranbrook* (1997), 147 DLR (4th) 385 at 391-92, Lamer CJC.

Breach of Fiduciary Obligation to Comply with Terms of Treaty

As the foregoing excerpts from the Commission's earlier reports imply, although we consider the treaties to be the primary source of Canada's obligations in the treaty land entitlement context, we are also of the view that "the Crown has a fiduciary duty to live up to its treaty obligations." A failure by Canada to provide a band with its full measure of treaty land is a breach of fiduciary duty because it violates the general trust-like responsibilities that Canada owes First Nations in matters concerning Indian title. However, breach of fiduciary duty constitutes only an *alternative* basis for liability since, as noted above, the cornerstone of our conclusion regarding liability is that Canada is in breach of the terms of Treaty 1.

The fiduciary relationship of Canada and First Nations has been clearly established by an increasingly lengthy line of cases beginning with *Guerin v. The Queen*[38] in which the Supreme Court of Canada has repeatedly recognized the *sui generis* or "unique character both of the Indians' interest in land and of their historical relationship with the Crown."[39] The effect of these decisions is that the relationship between the Crown and aboriginal peoples is "trust-like" or fiduciary in nature, particularly in relation to the reservation and protection of treaty lands.

It will be recalled that, in *Guerin*, the Musqueam Band surrendered 162 acres of reserve land to the Crown for lease to a golf club on the understanding that the lease would contain the terms and conditions that were presented to and agreed upon by the Band Council. The Band later discovered that the terms of the lease obtained by the Crown were significantly different from those the Band had agreed to and indeed were less favourable. All eight members of the Court found that Canada had breached its duty to the Band, although Wilson J (Ritchie and McIntyre JJ concurring) founded the obligation on trust principles and Estey J considered the relationship to be one of principal and agent. However, Dickson J (as he then was), with the concurrence of Beetz, Chouinard, and Lamer JJ, took a different approach:

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[38] *Guerin v. The Queen*, [1984] 2 SCR 335, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120.

[39] *Guerin v. The Queen*, [1984] 2 SCR 335 at 387, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

> *In my view, the nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty.* If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.
>
> *The fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have a certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown.* The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.[40]

Dickson J continued:

> [T]he Indians' interest in land is an independent legal interest. It is not a creation of either the legislative or executive branches of government. The Crown's obligation to the Indians with respect to that interest is therefore not a public law duty. While it is not a private law duty in the strict sense either, it is nonetheless in the nature of a private law duty. Therefore, in this *sui generis* relationship, it is not improper to regard the Crown as a fiduciary.[41]

Dickson J later added:

> The Crown's fiduciary obligation to the Indians is therefore not a trust. To say as much is not to deny the obligation is trust-like in character. As would be the case with a trust, the Crown must hold surrendered land for the use and benefit of the surrendering Band. The obligation is thus subject to principles very similar to those which govern the law of trusts concerning, for example, the measure of damages for breach. The fiduciary relationship between the Crown and the Indians also bears a certain resemblance to agency, since the obligation can be characterized as a duty to act on behalf of the Indian Bands who have surrendered lands, by negotiating for the sale or lease of the land to third parties. But just as the Crown is not a trustee for the Indians, neither is it their agent; not only does the Crown's authority to act on the

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[40] *Guerin v. The Queen*, [1984] 2 SCR 335 at 376, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J. Emphasis added.

[41] *Guerin v. The Queen*, [1984] 2 SCR 335 at 385, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

> Band's behalf lack a basis in contract, but the Band is not a party to the ultimate sale or lease, as it would be if it were the Crown's principal. I repeat, the fiduciary obligation which is owed to the Indians by the Crown is *sui generis*. Given the unique character both of the Indians' interest in land and of their historical relationship with the Crown, the fact that this is so should occasion no surprise.[42]

Six years later, in *R. v. Sparrow*,[43] decided in 1990, the Supreme Court once again considered the application of fiduciary principles to the relationship between Canada and a member of a First Nation. The case dealt with aboriginal fishing rights – specifically, whether the restriction in the federal *Fisheries Act* regarding the permitted length of a drift net was inconsistent with section 35 of the *Constitution Act, 1982*, and therefore invalid. In outlining the approach to be taken with respect to interpreting section 35, Dickson CJ and La Forest J, who co-wrote the decision of the entire Court, gave a broad interpretation to the fiduciary analysis in *Guerin*:

> In *Guerin, supra*, the Musqueam Band surrendered reserve lands to the Crown for lease to a golf club. The terms obtained by the Crown were much less favourable than those approved by the Band at the surrender meeting. This Court found that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360, [1981] 3 C.N.L.R.114, ground a general guiding principle for s. 35(1). That is, *the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.*[44]

The following year, in *Ontario (Attorney General) v. Bear Island Foundation*,[45] the Court offered a further glimpse into the fiduciary obligations owed by Canada to its native peoples. Ontario

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[42] *Guerin v. The Queen*, [1984] 2 SCR 335 at 386-87, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

[43] *R. v. Sparrow*, [1990] 1 SCR 1075, [1990] 3 CNLR 160.

[44] *R. v. Sparrow*, [1990] 1 SCR 1075 at 1108, [1990] 3 CNLR 160, Dickson CJ and La Forest J. Emphasis added.

[45] *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 SCR 570, [1991] 3 CNLR 79.

commenced the proceedings to obtain both injunctive relief and a declaration that, first, the provincial Crown held clear title to the lands in question and, second, the Indians had no interest in those lands. The Foundation counterclaimed, seeking a declaration of quiet title on the ground that the Temagami had a better right to possession by virtue of their aboriginal rights in the land. The province responded that the Temagami had no aboriginal rights in relation to the land, or alternatively that any right they might have had was extinguished, either by treaty or by unilateral act of the sovereign. On these bases, the province had been successful before both Steele J at trial and the Ontario Court of Appeal. Speaking *per curiam*, the Supreme Court of Canada dismissed the Foundation's appeal, but, in *dicta*, observed the following regarding the Crown's fiduciary obligations:

> It is unnecessary, however, to examine the specific nature of the aboriginal right because, in our view, whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve. *It is conceded that the Crown has failed to comply with some of its obligations under this agreement, and thereby breached its fiduciary obligations to the Indians*. These matters currently form the subject of negotiations between the parties. It does not alter the fact, however, that the aboriginal right has been extinguished.[46]

Robert Reiter offered this view of the significance of this decision in his text entitled *The Law of First Nations*:

> The *Bear Island* case stands as an extension of the concept of fiduciary duty which was originally formulated in *Guerin*. In *Guerin*, the duty was limited to the administration of surrendered lands. In *Sparrow*, a general statement of intent was made with respect to the Crown's obligations as to honouring aboriginal rights. With *Bear Island*, the fiduciary concept was extended to include the Crown's obligation to honour treaty rights. The honouring of treaty and aboriginal rights is not a strict obligation as in the *Guerin* case, rather, the obligation is extended and underwritten as a political and moral obligation which is now being defined piecemeal through case law.
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> The case underwrites treaty rights. Notwithstanding the ruling on the extinguishment of aboriginal rights through the treaty making process, the case

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[46] *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 SCR 570 at 575, [1991] 3 CNLR 79.

> provides a new means for acquiring Indian objectives, (e.g., on the breach of a treaty right, the band may, through the enforcement of the fiduciary obligation, acquire an interest roughly equivalent to that associated with aboriginal title or may have specific treaty obligations enforced).[47]

At the same time, it is important to note that, in a 1994 case – *Québec (Attorney General) v. Canada (National Energy Board)*[48] – the Court also explicitly recognized that there are limits on the Crown's fiduciary obligations to Indian bands. Following lengthy public hearings including extensive submissions by the Grand Council of Crees (of Québec) and the Cree Regional Authority (the "appellants"), the National Energy Board issued licences to Hydro-Québec to export electrical power to the states of New York and Vermont. The appellants claimed, among other grounds of appeal, that the board was an agent of government and a creation of Parliament and thus owed the appellants, by virtue of their status as aboriginal peoples, a fiduciary duty extending to the decision-making process used in considering applications for export licences. According to the appellants, this meant that the board was required to go beyond principles of natural justice by compelling that all information necessary for the appellants to make their case against the applications be disclosed to ensure their full and fair participation in the hearing process. The appellants further argued that the Board was obliged to take their best interests into account when making its decision.

On behalf of the entire Court, Iacobucci J rejected these submissions, concluding that, since the board was a quasi-judicial tribunal, it was not required to make its decision in the best interests of the Grand Council and the Regional Authority. However, his reasons also applied to the fiduciary relations of the Crown and aboriginal peoples in more general circumstances:

> It is now well settled that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada: *Guerin v. The Queen*, [1984] 2 S.C.R. 335. Nonetheless, it must be remembered that *not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation*: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. The nature of the

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[47] Robert Reiter, *The Law of First Nations* (Edmonton: Juris Analytica Publishing, 1996), 255.

[48] *Québec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 (hereafter referred to in the text as the "*National Energy Board* case").

> relationship between the parties defines the scope, and the limits, of the duties that will be imposed.[49]

The following year, in *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* (hereafter referred to in the text as the *Apsassin* case),[50] the Court considered the existence of a fiduciary relationship between the Crown and the Beaver Band of Indians in the context of an inadvertent surrender of mineral rights during the course of a broader surrender of reserve land for the settlement of war veterans. In her reasons, McLachlin J asked

> whether on the particular facts of this case a fiduciary relationship was superimposed on the regime for alienation of Indian lands contemplated by the *Indian Act*.
>
> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second "peculiarly vulnerable" person: see *Frame v. Smith*, [1987] 2 S.C.R. 99; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power trusts the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation.[51]

The reasons of both Gonthier and McLachlin JJ suggest that, in the proper circumstances, the Crown might owe fiduciary duties to a band in the pre-surrender context – in particular, where the band's understanding of the terms of the surrender is inadequate, where the conduct of the Crown has tainted the dealings in a manner that makes it unsafe to rely on the band's understanding and intention, where the band has ceded or abnegated its decision-making authority to or in favour of the Crown in relation to the surrender, or where the surrender is so foolish or improvident as to be considered exploitative.

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[49] *Québec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 SCR 159 at 183. Emphasis added.

[50] *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344.

[51] *Blueberry River Indian Band v. Canada (Minister of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at 371, McLachlin J

Nevertheless, on the facts in *Apsassin*, the Court concluded that Canada had not breached any pre-surrender fiduciary obligations to the Band. However, the Court did find that Canada's usual practice was to retain the mineral rights when granting title to the surface, commenting that a reasonable person does not (a) inadvertently give away a potentially valuable asset that has already demonstrated earning potential or (b) give away for no consideration that which it will cost him nothing to keep and which may one day possess value, however remote the possibility. Canada's failure to retain the mineral rights, or to take available steps to reacquire those rights, thus amounted to a post-surrender breach of fiduciary obligation.

In light of the foregoing cases we are secure in concluding that there is a fiduciary relationship between the federal Crown and the aboriginal peoples of Canada. That being said, we must acknowledge the comments of Iacobucci J in the *National Energy Board* case that "not every aspect of the relationship between fiduciary and beneficiary takes the form of a fiduciary obligation." However, given the solemn obligations embodied in Canada's treaties with First Nations, and further given the fundamental importance of the treaties in defining the relationship between Canada and the Indians, it would seem to follow that the Crown's undertaking in the treaties to provide reserve land comprises one aspect of the relationship that takes the form of a fiduciary obligation.

Conduct-Based Breaches of Fiduciary Duty

In the preceding analysis we have discussed how fiduciary obligations owed by Canada to First Nations arise from the trust-like nature of the relationship between the parties. In this sense of Canada's fiduciary duty, the question of breach in the context of allotting reserve land is measured by the standard prescribed in the treaty. Canada's historical and legal obligation in this case was to provide Long Plain with sufficient reserve land to satisfy the Treaty 1 formula of "one hundred and sixty acres for each family of five, or in that proportion for larger or smaller families." The treaty could not be clearer. Since Canada fell short of the required acreage, that fact alone results in a breach of the terms of the treaty. It also constitutes, as we have concluded, a breach of Canada's fiduciary duty to live up to its treaty obligations. The nature of Canada's *conduct*, whether inadvertent or otherwise, is not a significant consideration in simply establishing the existence of the *breach* of duty.

However, quite apart from the duties relating to reserve land arising from treaty and the general trust-like relationship between Canada and First Nations, it seems clear to us that separate causes of action for fiduciary breach *could* arise as a result of Canada's conduct in its dealings with First Nations. Thus, for example, in *Guerin*, the Crown's representatives were held to have breached a fiduciary duty to the Musqueam Band when they proceeded with the lease on the terms proposed by the golf club without referring the question back to the Band for a decision. Similarly, in *Apsassin*, Canada's failure to retain the inadvertently conveyed mineral rights, or to reacquire those rights using available means, amounted to a breach of fiduciary obligation. Although the Court concluded that fiduciary breaches occurred, in neither case did the breaches stem from Canada's failure to comply with the terms of a treaty or other agreement. Rather, those breaches sprang from Canada's failure to act with the degree of fidelity, honesty, and effort required to satisfy its duty of loyalty to the bands in those cases.

It would seem to us to be unnecessary for a First Nation to establish a conduct-based breach of fiduciary obligation to maintain a cause of action for loss of use. Since the failure on Canada's part to deliver treaty land in a timely way is certainly a breach of the treaty and arguably also a breach of the general fiduciary duty owed in relation to Indian title, the cause of action is already amply substantiated. Indeed, even if we are incorrect in our conclusion that a failure to provide the full measure of treaty land amounts to a breach of a general fiduciary obligation, the existence of a cause of action based upon breach of treaty alone is incontrovertible. Thus, a third basis for the cause of action seems redundant.

We wish to be clear, however, in stating our belief that the full facts of each treaty land entitlement case, viewed in their proper historical context, are of fundamental importance in assessing the *quantum of compensation* to which a band is entitled. In that regard, Canada's conduct over the course of the entire historical time period is especially relevant. More will be said about this in the portion of our report entitled "Principles of Compensation."

Therefore, in this case, given our finding that the facts have already disclosed a breach of treaty and a breach of Canada's trust-like obligation to comply with the terms of Treaty 1, we do not find it necessary at this point to go into the question of whether Canada's conduct amounted to a further basis for concluding that a breach occurred. Moreover, in light of the parties' decision to

proceed by means of the Joint Statement of Agreed Facts and to direct the Commission to refrain from making further findings of fact, we do not have enough information in any event to conclude definitively whether Canada's actions in setting apart Long Plain's reserve constituted a conduct-based breach of fiduciary duty. Subject to our comments below regarding Canada's submissions that the shortfall was inadvertent, we will refrain from making any observations regarding the parties' conduct until the second stage in this inquiry.

Defences

Notwithstanding our view that a treaty land entitlement shortfall in and of itself gives rise to a breach of treaty and a breach of fiduciary duty, we must consider certain defences that, in Canada's submission, preclude a finding of breach in this case. Essentially, Canada tenders three defences:

(a) that it has not breached Treaty 1 because the treaty does not set any firm time limit within which treaty land must be set aside;

(b) that there should be no finding of breach if Canada's performance is measured not by today's standards but by standards that would have been appropriate in 1876; and

(c) that the shortfall resulted from mere inadvertence or "honest mistake" which should not be considered sufficient to ground a finding that Canada breached its obligations to the Band.

We will address each of these defences in turn.

No Duty to Provide Land at a Specified Date

Canada submits that Long Plain's position "to a large extent either succeeds or fails on the characterization of 1876 and whether or not Canada was in breach of a duty at that time."[52] In counsel's view, the language of Treaty 1 demonstrates that the parties did not intend that Canada would provide bands with reserve lands at a specified date. Rather, the words "Her Majesty the Queen hereby *agrees* and *undertakes* to lay aside and reserve for the sole and exclusive use of the Indians the following tracts" indicate a need for *future* events – specifically, the precise description

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[52] ICC Transcript, October 17, 1997, p. 127 (Perry Robinson).

of the reserve boundaries by means of a survey, and the acceptance of the reserve by the band – before a reserve can be said to have been created.[53] Canada contends that, (a) since there was no obligation to set apart reserve lands at a specified date, (b) since it showed that it was ready and willing to put things right when the shortfall was discovered in the late 1970s, and (c) since it eventually entered into the Settlement Agreement with Long Plain, there was no breach of any obligation to the First Nation in 1876 or at all.[54]

Long Plain dismisses Canada's position as "specious" and "unseemly." Instead, the First Nation counters, the parties more likely intended that the reserve should be created as soon as possible or at least within a reasonable time after the treaty was executed.[55]

The essence of Canada's position as we understand it is that the Crown was not in breach of either the terms of Treaty 1 or any other obligation or duty to the Band because there was no requirement in the treaty to set apart reserve lands at any specified date. We are not persuaded by this argument. The process of consummating treaties between Canada and the aboriginal peoples of the prairies was fundamental to the settlement of the west. We are not prepared to give credence to an interpretation of those treaties that would lead to a conclusion that Canada did not have an obligation to carry forward with the full implementation of the allocation of reserve lands in a timely way. Whether Canada's response has been "timely" will vary from case to case and may depend in part on the conduct of the band itself. For example, the Commission is aware of instances where, following execution of a treaty, members of a band have specifically asked *not* to have a reserve set apart until some time in the future when they would be ready to settle, or have made no request for reserve land at all. In such cases, although the *equitable obligation* to provide treaty land would have arisen upon execution of the treaty, there may well not be a *breach* of the treaty until Canada is asked to provide treaty land and fails to do so within a reasonable period of time. It also warrants emphasis that, in many cases, band composition and membership were fluid and, in some cases, unascertainable as aboriginal peoples adapted to a new agricultural way of life throughout the course of the 19th

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[53] Submissions on Behalf of the Government of Canada, September 26, 1997, p. 5.

[54] Submissions on Behalf of the Government of Canada, September 26, 1997, p. 13; ICC Transcript, October 17, 1997, p. 135 (Perry Robinson).

[55] Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, p. 18.

century; in such cases, Canada's failure to deliver the full treaty land entitlement might only be disclosed through modern methods of paylist analysis. In other circumstances, Canada has defaulted in its obligation to deliver up land in the face of a band's repeated requests. Stated simply, each and every treaty land entitlement case is different and requires a detailed historical review of the facts giving rise to the claim.

In this case, Canada was asked to set apart a separate reserve for Short Bear and his followers shortly after the 1876 revision to Treaty 1, and did so. However, although Canada's initial *response* to Short Bear's request was timely, its provision of the full measure of treaty land was *not*. Once it undertook to set apart a reserve it must also be considered to have undertaken to exercise *reasonable diligence, skill, and care* in doing so – *in 1876*. Clearly, the First Nation's full treaty land entitlement was not set apart at that time, and there is no evidence before us to suggest that Short Bear asked for anything less. Indeed, if such a request had been made, there would undoubtedly be no need for this inquiry. That being said, we understand the difficulties inherent in the land selection process in the late 19th and early 20th centuries, and we are not suggesting that the selection process may not have taken a number of years, or even decades. However, Canada's failure to provide the full measure of treaty land in this case until 118 years after the fact falls short of any reasonable standard of timeliness.

Performance Not to Be Measured by Today's Standard

Canada also suggests that, when the Commission considers the actions of Canada's representatives in 1876, it must assess their use of the annuity paylist to establish the size of IR 6 from the perspective of 1876 and not with the benefit of hindsight using present-day sophisticated paylist analysis.[56] From the perspective of 1876, Canada initially contends that no breach occurred. In the alternative, counsel argues that, if a breach *did* occur, and assuming that loss of use is compensable under the Specific Claims Policy, then the appropriate shortfall population should be 197 because, according to paragraph 8 of the Joint Statement of Agreed Facts, this is the figure that surveyor Lestock Reid apparently derived when he set apart the reserve. In the further alternative, Canada argues that the

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[56] Submissions on Behalf of the Government of Canada, September 26, 1997, p. 19

shortfall population should be 205, reflecting the figure of 223 that formed the basis of the 1994 Settlement Agreement less the 18 absentees and arrears payees of whom Reid could not have known in 1876. According to counsel, Reid's actions must be evaluated on the basis of whether he acted with the prudence of a man managing his own affairs.[57]

Long Plain in rebuttal submits that the breach was *Canada's* breach and not solely the responsibility of Lestock Reid.[58] Counsel further argues that, "even if ... the Band had been provided with sufficient land for the 209 on the list in 1876, Canada would still have breached the treaty and its fiduciary duty to the band because it had it within its capacity to determine the correct figure ([including] 15 arrears payees and 3 absentees) and had undertaken to do so to this very Claimant."[59]

Moreover, since the dominion land surveys had already marked out the townships in the Long Plain area by the time Reid and Short Bear met to select the reserve lands, counsel for the First Nation asserts that there never really has been a survey of the Long Plain reserve at all:

> What we have instead of – instead of a survey extracting a parcel and identifying it and confirming it, we have a surveyor going out and saying with reference to a prior existing dominion land survey, these sections will now comprise the reserve. There never was a survey of the reserve as such, so there is no date of first survey. That's one thing that goes out the window on the facts of this claim. There's no date of first survey. There may be a date of location or identification of the reserve, but we cannot use the traditional language of DOFS....
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> ... back then the only things that were done to establish Long Plain reserve number 6 were Reid drawing a line on an existing dominion land survey map in 1876;[60] and two, this Order-in-Council [PC 2876 dated November 21, 1913].[61]
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> This Order-in-Council doesn't even say this is now a reserve. Keep in mind that what happened in 1872 was that the dominion land survey system was imposed on this part of the world. A dominion land survey was done, and all this Order-in-Council does is remove Long Plain land described under paragraph 2 from the

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57 Submissions on Behalf of the Government of Canada, September 26, 1997, p. 19.

58 Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, p. 15.

59 Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, p. 17.

60 Dominion Lands Office, *Plan of Township No. 10, Range 8, West of First Meridian*, surveyed by C.J. Bouchelle, March 1872; approved and confirmed by J.S. Dennis, Surveyor General, June 1, 1873 (ICC Exhibit 6).

61 Order in Council PC 2876, November 21, 1913 (ICC Exhibit 5).

> operation of the Dominion Lands Act. That's all this Order-in-Council does. It doesn't declare there's a reserve. It doesn't create one. It doesn't make reference to the Indian Act. All it says is the land, the 17 square miles of Long Plain is removed from the operation of the Dominion Land Act....
>
> ... administratively what is happening in the establishment of the Long Plain reserve number 6 is that government is approaching this thing, is approaching the reserve issue not from the standpoint of performance of a duty to the First Nation, but just sort of cleaning up administratively how the Dominion Lands Act is going to operate in relation to this hole that's now created by Lestock Reid and Short Bear having gone out and identified where Long Plain number 6 is going to be.[62]

In our view, the position being advanced by Canada is certainly relevant to the determination of the compensation to which the First Nation is entitled, but it is not relevant to the question of whether Canada was in breach of Treaty 1 or in breach of its trust-like fiduciary obligations to Long Plain. In other words, in the second stage of this inquiry, if required to determine compensation, Canada can argue that damages of a certain quantum do not flow from its failure to allocate the appropriate quantum of treaty land because Canada "did not know" that there was an outstanding entitlement. Canada might even argue that a First Nation's entitlement to compensation for loss of use is circumscribed until such time as Canada knew or should reasonably have known of the existence of an arguable claim. However, the fact is that Canada is in breach of the terms of Treaty 1 because it failed to provide the proper quantum of land – whether it knew this or not. The breach flows from Canada's failure to provide the land, not from its knowledge that it is in default. This is so, in our view, whether the basis of liability is breach of treaty, breach of fiduciary obligation, or both.

On the facts in this case, however, we take the view that Canada must be considered to have failed in meeting its obligations regardless of whether the perspective is from today or 1876. Paylist analysis shows that the 1876 population of the Long Plain First Nation was 223 (including absentees and arrears payees), whereas the base paylist population was 209. The "reduction exercise" used by Lestock Reid to determine Long Plain's share of the 25 square mile area under Treaty 1 to be divided among Yellowquill, Short Bear, and the White Mud people under the 1876 revision to Treaty 1

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62 ICC Transcript, October 17, 1997, pp. 57 and 59-60 (Rhys Jones).

apparently yielded a population of 197 for Short Bear's band[63] – the figure that Canada suggests is the information Reid had when he conducted the survey. The largest number of whom Reid could have known in 1876, according to Canada, was 205, being the treaty land entitlement population of 223 less 18 absentees and arrears payees of whom Reid could not have known. Yet the area allocated to the Band in 1876 under the Treaty 1 formula of 32 acres per person was 5303 acres – *sufficient land for only 165 people*. There is no evidence to indicate why only this limited area was surveyed or why Canada failed until the 1970s to identify that a shortfall had occurred. Although Reid might be forgiven for failing to allocate reserve land for 18 absentees and arrears payees of whose existence he was unaware, that does not excuse Canada from reviewing its files to ensure that, in the first instance, Long Plain had received its full allotment for those individuals of whom Reid *was* aware. This was a very substantial shortfall: it is not the sort of case referred to by Juliet Balfour in her letter of December 17, 1992, to former Chief Peter YellowQuill, when she commented that "it is only through the sophistication of contemporary research that First Nations and governments are even aware that there may have been a DOFS shortfall."[64]

The only explanation offered by counsel for Canada is inadvertence or "honest mistake," and we will consider that issue shortly. We would emphasize that it remains open to Canada to argue at the second stage of this inquiry, if required, that its actions in setting apart land for only 165 people were defensible in the circumstances such that compensation for the breach might be limited in accordance with the principles we will discuss below.

With regard to the First Nation's suggestion that there was no first survey, but merely an identification of reserve lands by reference to a pre-existing dominion land survey, we acknowledge that there was no survey undertaken specifically for Long Plain. We also recognize that the comments in our report on the Kahkewistahaw treaty land entitlement inquiry might be narrowly construed as

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[63] Joint Statement of Agreed Facts, Long Plain First Nation Treaty Land Entitlement Loss of Use Claim, August 8, 1997, p. 2, para. 8 (ICC Exhibit 2).

[64] Juliet Balfour, Negotiator, Treaty Land Entitlement Branch, Indian and Northern Affairs Canada, to Chief Peter YellowQuill, Long Plain First Nations Tribal Council, December 17, 1992, p. 3 (ICC Exhibit 2, Schedule "G").

requiring a band-specific survey as part of the process for creating a reserve.[65] That report dealt with a situation where there was no preceding dominion land survey in relation to the reserve lands.

However, it is our view that, where a dominion land survey has already been undertaken, it is not necessary to conduct another survey for Canada and a band to be able to identify the land desired for the band's reserve and for the parties to reach a consensus that the land so identified constitutes the reserve for the purposes of the treaty. Canada clearly considered that IR 6 comprised Long Plain's reserve under Treaty 1, as can be seen from the Order in Council removing those lands from the operation of the *Dominion Lands Act*:

> WHEREAS Subsection (a) of Section 76 of the Dominion Lands Act, 1908, provides that the Governor in Council may withdraw from the operation of the Act, subject to existing rights as defined or created thereunder, *such lands as have been or may be reserved for Indians*.
>
> THEREFORE His Royal Highness the Governor General in Council is pleased to Order that *the lands comprised within the following reserves* shall be and the same are hereby withdrawn from the operations of the Dominion Lands Act....[66]

Long Plain's IR 6 is among the lands enumerated in the Order in Council. Likewise, there is no evidence before the Commission to suggest that the First Nation has ever disclaimed IR 6 as its reserve.

Although it is unlikely that the date of a dominion land survey will have relevance in terms of establishing a band's date of first survey, that is not an issue that requires our attention in this inquiry. All that need be said here is that the fact that Canada did not undertake a separate survey of the Long Plain reserve should not, in and of itself, be considered a breach of Canada's treaty obligations to the First Nation.

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[65] Indian Claims Commission, *Kahkewistahaw First Nation Treaty Land Entitlement Inquiry* (1998), 6 ICCP 21 at 79-80.

[66] Order in Council PC 2876, November 21, 1913 (ICC Exhibit 5).

Mere Inadvertence or Honest Mistake Insufficient to Ground Breach of Duty

In his oral submissions before the Commission, counsel for Canada stated:

> [G]iven that [Lestock] Reid has obviously used such care in the case of Swan Lake and in White Mud and his figures do add up, we're left with a situation for Long Plain where there's no real explanation why he provided an amount of land that's even less than the 197 figure that he was obviously using.... [T]here's no suggestion at all of negligence per se in the carrying out of their duty. It just appears to be a mistake, and I suggest that there are legal consequences that flow from that.[67]

What are those consequences? Counsel argues that, should the Commission conclude that Canada has failed through mistake or inadvertence to provide Long Plain with the full measure of its treaty land entitlement, such a finding may be insufficient to establish a breach of duty.[68] In counsel's submission, based on fiduciary principles said to have been established in *Apsassin*, "absent any lack of the exercise of 'due care, consideration and attention'" on Canada's part, *mere inadvertence* and a *lack of knowledge* that the "best interests" of a First Nation may have been compromised may not be enough to warrant a finding that there has been a breach of duty.[69] Counsel contends that the shortfall in this case was inadvertent, and because Canada only learned of the shortfall in the 1970s and then proved itself ready and willing to fulfill its obligations, there was no breach of Canada's duty to provide reserve land.[70] By way of contrast, had Canada refused to negotiate when it became aware of the shortfall, counsel conceded that such refusal "would have constituted a breach."[71]

Long Plain counters that, despite Canada's suggestion that the shortfall occurred as a result of inadvertence, "the fact is that there is no written record of why Reid used the population figure of 197."[72] Since Canada was obliged by the treaty to provide Long Plain with its full measure of treaty

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67 ICC Transcript, October 17, 1997, pp. 123 and 125 (Perry Robinson).

68 Submissions on Behalf of the Government of Canada, September 26, 1997, p. 14.

69 Submissions on Behalf of the Government of Canada, September 26, 1997, p. 16.

70 Submissions on Behalf of the Government of Canada, September 26, 1997, p. 16.

71 ICC Transcript, October 17, 1997, p. 126 (Perry Robinson).

72 Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, p. 12.

land, it is not appropriate, in counsel's submission, to say that there is no breach unless the First Nation discovers the failure to perform and asks Canada to rectify it.[73] Moreover, the First Nation contends that Canada has had a number of opportunities to determine the accuracy of Long Plain's reserve allotment and its failure to do so amounts to a "reckless or callous disregard of its duty."[74]

The Commission notes in Canada's submission the statement that, *absent any lack of due care, consideration and attention by the fiduciary*, a lack of knowledge that the best interests of a First Nation may have been compromised may be insufficient to ground a finding of breach of duty. As we have already observed, we have no evidence before us to suggest that Short Bear asked for anything less than the full allotment of reserve land for his band under Treaty 1 in 1876. That being so, Canada asks us to conclude that, because the land allocations to the other two factions of the Portage Band indicate that Reid *did* exercise due care, consideration, and attention in those cases, the failure to provide Long Plain with its full allotment of treaty land must have resulted from mere inadvertence. We take Canada's position to be that Reid's error was merely inadvertent because he *was* exercising due care, consideration, and attention, whereas the same error *in the absence of* such due care, consideration, and attention might amount to a remediable breach.

However, regardless of the degree of Reid's care, consideration, and attention, Canada's submissions on this point still do not come to grips with the simple fact that, following the survey, Long Plain was left with a shortfall of treaty land. In our minds, that constitutes a breach of treaty. Conduct *per se* is not relevant to the issue of whether the obligation to provide treaty land under the terms of the treaty has been satisfied. Expressed in another way, it is our conclusion that Canada is in breach of the terms of a treaty if it has failed to deliver the appropriate quantum of land to which a First Nation is entitled under the terms of a treaty within a reasonable time of being asked to do so. That Canada may be unaware of a shortfall in the land allocated cannot vitiate the fact that Canada is in breach of the terms of the treaty. Similarly, the fact that Canada may have a very good explanation as to why the land has not been allocated does not mean that Canada is not in breach of the treaty or liable for damages or compensation flowing from that breach. The breach resides in the

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[73] ICC Transcript, October 17, 1997, pp. 159-60 (Rhys Jones).

[74] Rebuttal Submissions on Behalf of the Long Plain First Nation, October 8, 1997, pp. 12-13.

fact that the appropriate amount of land has not been provided in a timely way in accordance with the terms of the treaty. We therefore reject Canada's argument on this point.

That being said, if we were required to make a determination based solely on the Joint Statement of Agreed Facts, we would lean to the conclusion that some form of conduct-based breach of Canada's fiduciary obligations to the First Nation may have occurred, having regard for the extensive size of the shortfall in this case and the absence of any explanation. However, we see no evidence at this point to support Long Plain's argument that Canada callously and recklessly disregarded the First Nation's interests. True, Canada may have failed to exercise proper skill and care in setting apart the reserve, but there is no evidence before the Commission to suggest that the failure to provide Long Plain with its full measure of treaty land arose as a result of recklessness or any deliberate attempt to cheat the First Nation out of its proper entitlement. We see a distinction between Long Plain, which never received its full treaty land entitlement, and bands that may have received their full entitlements at the outset but then lost them through deliberate malfeasance by Canada's agents, such as we saw in the Kahkewistahaw and Moosomin surrender inquiries.

Nevertheless, we agree with counsel for Canada that, if the shortfall occurred because of inadvertence or honest mistake, as opposed to negligence or some degree of *mala fides*, then there *are* legal consequences. However, those consequences do not relate to the question of whether a *breach* occurred. The real significance of the distinction between "conduct-based" fiduciary breaches on the one hand and breaches of treaty and "treaty-based" fiduciary breaches on the other lies not in the question of *liability*, as Canada will be liable in either event, but in the *level of compensation* to which the First Nation will be entitled, as we will discuss below.

In this regard, we are mindful of the necessity of examining each case on its own facts, and our experience has shown that each treaty land entitlement case must be scrutinized with specific regard to the conduct of both Canada and the band vis-à-vis the setting aside of reserve lands. Thus, for example, compensation for loss of use may vary widely between, on the one hand, cases in which the shortfall arose from some deliberate or reckless conduct on Canada's part, and, on the other, purely "research-driven" claims – situations in which Canada appeared to provide sufficient land for the members of a band based on the paylist in the year of first survey, but where later research has uncovered absentees or others of whom Canada could not have known at the time of survey and for

whom no land has ever been set aside. In the middle is a gray area in which the present case may well fall, where Canada may not have realized there was a shortfall but perhaps should have.

For the moment, the Commission simply concludes that, as a result of Canada's failure to fulfill its treaty obligations, Long Plain has endured a shortfall in its allocation of treaty land. In our view, the First Nation has a valid claim, not only for the full quantum of treaty land but also for compensatory damages or restitutionary compensation flowing from the shortfall. The quantification of that entitlement is, however, very much at issue. For the moment, we conclude only that Canada's breach of treaty and fiduciary duty gives rise to a lawful obligation that invokes the compensation provisions of the Specific Claims Policy, and that loss of use is to some extent available as a part of that lawful obligation.

Loss of Use as Head of Damage Rather than Separate Claim

There is one other position advanced by Canada that requires comment at this time. In the course of Canada's negotiation of the Settlement Agreement and, to a lesser extent, in the course of this inquiry, Canada has taken the position that Long Plain's loss of use claim is separate and distinct from the treaty land entitlement claim that was accepted for negotiation in 1982. In other words, Canada sought to impose upon the First Nation a requirement to advance this loss of use claim through the specific claims process as a new matter requiring a separate acceptance for negotiation. This position was clearly expressed in Juliet Balfour's letter of December 17, 1992:

> First, loss of use will not be considered as a separate head of damage or compensation in the negotiation and conclusion of a TLE claim. *If a First Nation believes it has grounds for a loss of use claim, it has to be pursued as a separate matter*. This is a policy position of the Specific Claims/Treaty Land Entitlement Branch which has been consistently followed across the west. This policy will not be changed in the case of your claim....[75]

Similarly, Al Gross stated on February 23, 1993:

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[75] Juliet Balfour, Negotiator, Treaty Land Entitlement Branch, Indian and Northern Affairs Canada, to Chief Peter YellowQuill, Long Plain First Nations Tribal Council, December 17, 1992, p. 1 (ICC Exhibit 2, Schedule "G"). Emphasis added.

> During our recent TLE negotiations you raised the issue of compensation for loss of use for the shortfall acreage. We responded by indicating that Canada, based on its review of the law applicable to a TLE claim, is of the view that *loss of use is not a proper item for negotiation in the context of the TLE claim*. This is consistent with our position in the recently concluded framework agreement in Saskatchewan.[76]

The same position was repeated by Bruce Hilchey on March 18, 1993:

> At our meeting with you on January 20, 1993, the Federal TLE negotiating team verbally provided to the Band the proposed settlement which our team was prepared to recommend to our Minister to fully and finally satisfy the Band's outstanding TLE. However, at that meeting, you argued that loss of use should be considered in any settlement. In response, we explained our position on loss of use based on the legal advice we had received. *Our position was and still is that loss of use must be actually proven based on legal principles, and this must be done separately from the TLE claim*.[77]

In the Commission's view, loss of use is a *head of damage* that must be considered in the context of the treaty land entitlement claim from which it springs. Generally speaking, it is *not* a *separate* claim or lawful obligation. It arises out of the same factual circumstances as a treaty land entitlement claim and therefore should not require a separate acceptance for negotiation by Canada. In the present case, Canada acknowledged the outstanding treaty land entitlement of the Long Plain First Nation in Minister John Munro's 1982 letter, and nothing further should be required for loss of use to be included as an item of negotiation. We consider it inappropriate for Canada to require the First Nation to submit a new claim for independent review and acceptance for negotiation in such circumstances. If, after confirming that a First Nation has an outstanding treaty land entitlement, Canada takes the position that loss of use is not compensable on the facts of a given case, it should be open to the First Nation to proceed directly to the Indian Claims Commission on the basis that it "disagrees with a decision of the Minister with respect to the compensation criteria that apply in the negotiation of a settlement."

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[76] Al Gross, Director, Treaty Land Entitlement Branch, Indian and Northern Affairs Canada, to Chief Peter YellowQuill, Long Plain First Nations Tribal Council, February 23, 1993, p. 1 (ICC Exhibit 2, Schedule "H"). Emphasis added.

[77] Bruce Hilchey, Negotiator, Treaty Land Entitlement Branch, Indian and Northern Affairs Canada, to Chief Peter YellowQuill, Long Plain First Nations Tribal Council, March 18, 1993, p. 1 (ICC Exhibit 2, Schedule "I"). Emphasis added.

PRINCIPLES OF COMPENSATION

The Commission has concluded that, until the 1994 Settlement Agreement resolved the issue of treaty land entitlement, Canada was in breach of the terms of Treaty 1 vis-à-vis the Long Plain First Nation because Canada failed to allocate in a timely way the full quantum of land required under the terms of that treaty. Canada may also have been in breach of its fiduciary duty to "live up to its treaty obligations." In our view, Canada was obliged, at a minimum, to fulfill the terms of Treaty 1 through the delivery of the full complement of land to which the First Nation was entitled. The essential question that follows is the compensation to which the First Nation is entitled as a result of Canada's delay. We have not been called upon in this inquiry to actually fix the amount of compensation payable, if any, but rather to address the general principles that apply in such a determination.

Our analysis must, by definition, begin with the Specific Claims Policy which sets forth the following general rule:

> As a general rule, a claimant band shall be compensated *for the loss it has incurred and the damages it has suffered as a consequence of the breach* by the federal government of its lawful obligations. This compensation will be based on *legal principles*.[78]

In this case the loss claimed to have been incurred is loss of use, and the Commission has already concluded that the First Nation has established the validity of its claim in terms of liability. As to whether loss of use is compensable in law, reference may be made at the outset to the following statement of principle by S.M. Waddams in *The Law of Damages*:

> Many kinds of legal wrongs cause a loss of property to the plaintiff. The commonest cases are negligence, destruction of goods, conversion, non-delivery by a seller, and loss by a carrier or bailee. Classified as legal wrongs, these instances seem to have little in common, crossing the borderline between contract and tort, negligence and trespass, and sale and service contracts. However, from the point of view of compensation, they all raise a single issue: *how to provide in money a substitute for property that the plaintiff does not have, but would have had but for the defendant's wrong*.
>
> *It is common in such cases that the plaintiff complains not only of the loss of property but also of the loss of its use. Had the wrong not been done, the plaintiff would have had, at the time of the complaint, not only capital wealth represented by*

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[78] *Outstanding Business*, 30; reprinted (1994), 1 ICCP 171 at 184. Emphasis added.

> *the property, but an accretion to wealth represented by profitable use of the property*. It is often difficult, as the subsequent discussion will show, to draw a clear line between these two claims, for the capital value of property reflects the value of its anticipated use. Thus, if instant reparation could be made for the plaintiff's loss, and a perfect substitute instantly acquired, there would never be a claim for loss of use. But reparation for legal wrongs is never made instantly, and substitutes are rarely perfect. Consequently, *compensation may be usefully regarded as containing two elements: a substitute for loss of the value of the property and a substitute for the loss of the opportunity to use it.*[79]

It is significant that courts of equity have long had the requisite jurisdiction to direct specific performance and to award damages, either in addition to or in substitution for specific performance. In the narrow context of a failure to deliver up real property, that jurisdiction to award damages extends to both damages arising from a deficiency in the quantum of land provided and damages flowing from late performance. The concept there at work is no different in import from that referred to by the shorthand term loss of use in treaty land entitlement claims.

It is also important to note that the leading case in relation to fiduciary obligations – *Guerin* – itself discloses that the courts are prepared to grant compensation for loss of use or lost opportunity. There, Collier J at trial awarded the Musqueam Band compensation of $10 million, a result that met with the approval of Dickson and Wilson JJ on the ultimate appeal to the Supreme Court of Canada. Wilson J stated:

> It seems to me that what the trial judge was doing once he rejected the value of a golf club lease (either the one the Band authorized or one which could be described objectively as "fair") as the value against which the Band's loss was to be measured was to put a value as of the date of trial on the Band's *lost opportunity* to develop the land for residential purposes and assess the Band's damages in terms of the difference between that figure and the value of the golf club lease. Is this a proper approach to compensation for breach of trust?
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> ...
>
> Since the lease that was authorized by the Band was impossible to obtain, the Crown's breach of duty in this case was not in <u>failing</u> to lease the land, but in <u>leasing</u> it when it could not lease it on the terms approved by the Band. The Band was thereby deprived of its land and any use to which it might have wanted to put it. Just

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[79] S.M. Waddams, *The Law of Damages*, 2nd ed. (Aurora, Ont.: Canada Law Book Inc., 1991), ¶ 1.10 and 1.20. Emphasis added.

> as it is to be presumed that a beneficiary would have wished to sell his securities at the highest price available during the period they were wrongfully withheld from him by the trustee (see *McNeil v. Fultz* (1906), 38 S.C.R. 198,) so also it should be presumed that the Band would have wished to develop its land in the most advantageous way possible during the period covered by the unauthorized lease. In this respect also the principles applicable to determine damages for breach of trust are to be contrasted with the principles applicable to determine damages for breach of contract. In contract it would have been necessary for the Band to prove that it would have developed the land; in equity a presumption is made to that effect: see Waters, *Law of Trusts in Canada*, at p. 845.
>
> I cannot find that the learned trial judge committed any error in principle in approaching the damage issue on the basis of a lost opportunity for residential development.[80]

Dickson J concurred that the judgment of Collier J disclosed no error in principle.[81]

Justice Wilson's decision to apply principles of restitution to compensate the Band for its lost opportunity was described by McLachlin J in these terms in *Canson Enterprises Ltd. v. Boughton & Company*:

> Applying the reasoning of restitution, Wilson J. concluded that the Crown in failing to consult the Band and obtain further instructions on the lease had committed a breach of trust. *The Crown was required to compensate the Band for the value of what was lost because of the breach, namely, the opportunity to enter into a more favourable arrangement. The value of this lost opportunity was based* not on the common law tort or contract measure of what might have reasonably been foreseen at the time, but *on the equitable approach of looking at what actually happened to values in later years*.[82]

It can therefore be seen that there is a strong basis for concluding that, as a matter of legal principle, compensation for lost opportunity or loss of use is available in cases in which Canada has deprived a band of the use of its reserve entitlement over an extended period of time.

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[80] *Guerin v. The Queen*, [1984] 2 SCR 335 at 359, 362-63, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Wilson J. Italic emphasis added.

[81] *Guerin v. The Queen*, [1984] 2 SCR 335 at 391, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

[82] *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 551, McLachlin J. Emphasis added.

That being said, Canada contends that there are several bases on which *Guerin* can be distinguished from the inquiry at hand. We disagree. First, as we have seen, counsel for Canada argues that it is important to the First Nation to characterize Canada's duty in this case as "fiduciary," as it was in *Guerin*, to make any breach of duty "readily discernible" and to import equitable principles regarding the assessment of damages.[83] The implication of Canada's submission is that different standards of conduct and principles of compensation apply to a "mere" breach of treaty than to a breach of fiduciary obligation. Given that the Commission has already concluded that Canada's breach in this case constituted both a breach of treaty *and* a breach of fiduciary obligation, this alleged distinction presumably falls away. However, as we will discuss below, even if we are wrong in concluding that the breach of treaty in this case also amounted to a breach of fiduciary duty, we nevertheless consider that breaches of treaty also attract the equitable jurisdiction of the courts.

Second, *Guerin* dealt with loss of use in the context of a *surrender* rather than in the circumstances of a *treaty land entitlement* shortfall. Reserve land that had been specifically allocated to the Musqueam Band was *given up* for the purpose of the long-term lease to the golf club, whereas in the present case Long Plain *never received* the shortfall land in the first place. For its part, Canada attaches considerable significance to this distinction, as we will discuss below. However, we do not believe that there is any conceptual difference between a treaty land entitlement shortfall and a surrender in relation to the principles of compensation that govern a loss of use claim.

Third, the courts in *Guerin* based liability on the failure of the Crown's representatives to return to the Musqueam Band to discuss the terms of the leasing counter-proposal that were less favourable than the terms previously approved by the Band; instead, those representatives mistakenly concluded that it was within the Crown's discretion to decide what was in the best interests of the Band – *without* consulting Band members, and *knowing* that the Band had not approved the terms of the counter-proposal. There was thus an element of moral failure on the part of the Crown's representatives in *Guerin* that, in the absence of further evidence, we cannot conclude existed in this case. Indeed, counsel for Canada contends, as we will see, that the failure to provide Long Plain with its full measure of treaty land in this case resulted from mere inadvertence rather than any deliberate,

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[83] Submissions on Behalf of the Government of Canada, September 26, 1997, pp. 10-11.

reckless, or other wrongdoing by Canada's agents. In the Commission's view, any such differences, if found to be material following a full review of the facts, are relevant in determining the *quantum* of compensation to be awarded but *not* in deciding whether loss of use is *compensable* in the first place.

We will now consider these points more fully.

Characterization of the Breach in Assessing Compensation

As we have seen, according to counsel for Canada, the reasons why it is important to the First Nation to characterize Canada's duty in this case as fiduciary are, first, to make any breach of the duty "readily discernible," since the higher standard of duty required of a fiduciary will be imposed, and, second, to import principles of fiduciary law regarding the assessment of damages.[84] Looking at the first of these arguments, we acknowledge that, at a conceptual level, a fiduciary may have to meet a higher *standard* than an individual who, although owing a duty, does not bear the fiduciary label.

However, in the case of a shortfall of treaty land, the duty is clearly spelled out in the terms of the treaty. Characterizing that duty as "fiduciary" does not change the nature of the obligation – namely, to provide a band with its full entitlement of treaty land in a timely way. Arguably, the standard of duty expected of Canada in fulfilling the terms of its treaties is higher than the standard of duty required of Canada as a fiduciary – the obligation expressed in the treaty is absolute, whereas the duty owed by a fiduciary is often expressed as one that demands only fidelity, honesty, and best efforts.

As for the argument that it is necessary to characterize Canada's duty as fiduciary to permit the Commission to import equitable principles of compensation to the assessment of damages, we strongly disagree. In our opinion, the remedies available in circumstances involving a treaty land entitlement shortfall – regardless of whether that shortfall is characterized as a breach of treaty or a breach of fiduciary obligation – must reflect the full equitable jurisdiction of the superior courts in this country.

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[84] Submissions on Behalf of the Government of Canada, September 26, 1997, pp. 10-11.

We have already observed the Supreme Court of Canada's repeated recognition of the *sui generis* or "unique character both of the Indians' interest in land and of their historical relationship with the Crown."[85] In this context, it seems clear that a valid claim by an Indian band with regard to a shortfall in the allocation of its reserve lands constitutes a *sui generis*, enforceable obligation. It is our view that, at law, such a claim is clearly on a higher plane than a contractual obligation, but even if it amounts to a mere contractual obligation, it will attract the intervention of the courts of equity. We have no doubt that this type of obligation, being equitable in nature, can be enforced by the courts, either through an award of specific performance or, in circumstances in which specific performance may not be available, an award of, first, compensatory damages in lieu of the shortfall land, and, second, compensatory damages for late performance. One way – although not the only way – of measuring the latter form of damages is by means of a loss of use analysis. Ultimately, regardless of whether we conclude that the shortfall in the present case amounts to a breach of treaty or a breach of fiduciary duty, Canada's lawful obligation will be measured as the compensation or damages that a court can award under general principles of law and equity.

The leading case from the Supreme Court of Canada – *Canson Enterprises* – provides very clear guidance on how that compensation should be calculated. It also demonstrates how the law relating to equitable compensation has evolved since *Guerin*. In *Canson Enterprises*, the Court addressed the question of compensation for which a solicitor should be liable when, in preparing a conveyance for a transaction, he failed to advise the purchasers of a secret profit made on a "flip" of the property in an intermediate transaction. The evidence showed that the purchasers would not have purchased the property had they been fully apprised of the situation. Following the purchase, the purchasers proceeded to develop the property but suffered substantial losses when piles supporting a warehouse forming part of the development began to sink, causing extensive damage to the building. When the soils engineers and the pile-driving company proved unable to cover the purchasers' losses, the purchasers defaulted on their mortgage and the mortgage company foreclosed. The purchasers commenced an action against the solicitor, alleging that the failure to disclose the secret profit was actionable as deceit or breach of fiduciary duty, and claiming that the solicitor must

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[85] *Guerin v. The Queen*, [1984] 2 SCR 335 at 387, [1984] 6 WWR 481, 13 DLR (4th) 96, [1985] 1 CNLR 120, Dickson J.

compensate for all the losses suffered, including those arising from the breaches by the soils engineers and the pile-driving contractor. However, these intervening breaches resulted in damages that the courts at all levels were reluctant to attribute to the conveying solicitor's failure to advise the purchasers of the profit made on the "flip" sale.

At the Supreme Court of Canada, La Forest J penned the plurality decision on behalf of four of the eight presiding justices, with Stevenson J adding a fifth concurring voice in separate reasons for judgment. La Forest J considered the solicitor's breach of fiduciary duty to be similar to the tort of deceit, and accordingly concluded that the purchasers would be adequately redressed by calculating compensation in accordance with tort principles – which, in deceit, "are considerably more liberal than normal tort or contract damages, in that *unforeseeable and foreseeable damages* are awarded."[86] He wrote:

> [I]n this particular area law and equity have for long been on the same course and whether one follows the way of equity through a flexible use of the relatively undeveloped remedy of compensation, or the common law's more developed approach to damages is of no great moment. *Where "the measure of duty is the same", the same rule should apply.... Only when there are different policy objectives should equity engage in its well-known flexibility to achieve a different and fairer result.*[87]

Clearly, La Forest J recognized the difference between the flexibility of equity, with its facility to devise remedies that effect restitution, and "the more restrictive aims of the common law in awarding damages for tort or breach of contract."[88] However, he considered that there are situations in which policy demands the application of equitable remedies:

> Where a situation requires different policy objectives, then the remedy may be found in the system that appears more appropriate. This will often be equity. Its flexible remedies such as constructive trusts, account, tracing and compensation must

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[86] Alan Pratt, "Fiduciary Principles and the Compensation Guidelines of 'Outstanding Business,'" unpublished paper, Toronto, January 1992, p. 13.

[87] *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 586-87, La Forest J. Emphasis added.

[88] Alan Pratt, "Fiduciary Principles and the Compensation Guidelines of 'Outstanding Business,'" unpublished paper, Toronto, January 1992, p. 15.

> continue to be moulded to meet the requirements of fairness and justice in specific situations.[89]

Later, in *Hodgkinson v. Simms*, La Forest J further elaborated on his comments in *Canson Enterprises*:

> *Canson* held that a court exercising equitable jurisdiction is not precluded from considering the principles of remoteness, causation, and intervening act where necessary to reach a just and fair result. *Canson* does not, however, signal a retreat from the principle of full restitution; rather it recognizes the fact that a breach of fiduciary duty can take a variety of forms, and as such a variety of remedial considerations may be appropriate....
>
> Put another way, equity is not so rigid as to be susceptible to being used as a vehicle for punishing defendants with harsh damage awards out of all proportion to their actual behaviour. On the contrary, where the common law has developed a measured and just principle in response to a particular kind of wrong, equity is flexible enough to borrow from the common law. As I noted in *Canson*, at pp. 587-88, this approach is in accordance with the fusion of law and equity that occurred near the turn of the century under the auspices of the old *Judicature Acts*.... Thus, properly understood *Canson* stands for the proposition that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded.[90]

McLachlin J in *Canson Enterprises* (Lamer CJ and L'Heureux-Dubé concurring) agreed in the result but on different grounds. She concluded that, because fiduciary duties spring from trust principles, very different considerations apply in awarding compensation for equitable breaches as opposed to damages for breaches at common law. As McLachlin J stated in that case:

> My first concern with proceeding by analogy with tort is that it overlooks the unique foundation and goals of equity. The basis of the fiduciary obligation and the rationale for equitable compensation are distinct from the tort of negligence and contract. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently the law seeks a balance between enforcing obligations by awarding compensation and preserving optimum freedom for those involved in the relationship in question, communal or otherwise. The essence of a fiduciary relationship, by contrast, is that one party pledges itself to

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[89] *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 588, La Forest J. Emphasis added.

[90] *Hodgkinson v. Simms*, [1994] 3 SCR 377 at 443-44, La Forest J.

> act in the best interest of the other. The fiduciary relationship has trust, not self-interest, at its core, and when breach occurs, the balance favours the person wronged. The freedom of the fiduciary is diminished by the nature of the obligation he or she has undertaken – an obligation which "betokens loyalty, good faith and avoidance of a conflict of duty and self-interest": *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592, at p. 606. In short, equity is concerned, not only to compensate the plaintiff, but to enforce the trust which is at its heart.[91]

In Justice McLachlin's view, equity's added objective of ensuring that fiduciaries are "kept up to their duty" means that attempts to effect restitution through equitable compensation require an approach that is different from damages in tort or contract, which simply seek to recover actual and reasonably foreseeable damage.[92] She concluded:

> [T]he better approach, in my view, is to look to the policy behind compensation for breach of fiduciary duty and determine what remedies will best further that policy. In so far as the same goals are shared by tort and breach of fiduciary duty, remedies may coincide. But they may also differ.[93]

From the foregoing authorities, the Commission derives the principle that, regardless of whether the starting point is law or equity, it is necessary to look to the underlying policy behind compensating Long Plain for Canada's breach of treaty and determine what remedies will best further that policy. Although McLachlin and La Forest JJ in *Canson Enterprises* and *Hodgkinson* differed on whether the appropriate starting point should be law or equity, they agreed that, where the policy objectives require, equitable remedies may be used and moulded to meet the requirements of fairness in a given case.

According to La Forest J, in the case of a trust-based relationship, the trustee's obligation is to hold the *res* or object of the trust for his beneficiary. On breach, the concern of equity is that the *res* be restored to the beneficiary or, if that cannot be done, to afford compensation for what the object would be worth. Similarly, if in the case of a breach of fiduciary duty there is a specific

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91 *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 543, McLachlin J.

92 Alan Pratt, "Fiduciary Principles and the Compensation Guidelines of 'Outstanding Business,'" unpublished paper, Toronto, January 1992, p. 17.

93 *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 545, McLachlin J.

property or proprietary interest that can be restored, restitutionary principles and remedies such as constructive trust can be applied to require the fiduciary to restore the property or interest to the beneficiary and to account for the profits wrongly obtained by the fiduciary. Where the fiduciary has received some benefit, that benefit can be disgorged.[94] We see no reason why the same equitable principles should not be applied in the case of a breach of treaty.

However, where there is no specific property that can be restored but there *has* been a breach of duty, the concern of equity is to ascertain the loss resulting from that breach. A court, exercising its equitable jurisdiction, can in lieu of restitution still award compensation to remedy that loss. What is lost as a result of the breach can include not only the value of an asset, but also the *lost opportunity* to use the asset profitably while the beneficiary has been deprived of it. In the Commission's view, there is nothing conceptually to distinguish "lost opportunity" as contemplated by Wilson and Dickson JJ in *Guerin* and by McLachlin J in *Canson Enterprises* from the sort of loss of use contemplated by the parties under Article 1.1(f) of the 1994 Settlement Agreement. We conclude, therefore, that equitable compensation for loss of use may be awarded as a matter of legal principle where the Crown owes an outstanding lawful obligation to an Indian band arising from a shortfall in the allocation of reserve land under treaty.

We turn now to the second basis on which Canada seeks to distinguish *Guerin*.

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[94] Long Plain argues that Canada has benefited from its breach by failing to remove the shortfall lands from the operation of the *Dominion Lands Act*:

> By not so removing it, Canada was able to procure a benefit from it by patenting it and selling it or by transferring it to Manitoba under the NRTA [*Natural Resources Transfer Agreement*] and therefore the Crown in its duel [sic] aspect also procured the benefit of all forms of municipal, property, and income taxation. Bona fide purchasers for value without notice subsequently profited from land the Claimant says should have been reserved for them [sic] since 1876.

We do not view this submission as a request that these "profits" be disgorged; rather, in the context within which this statement was made, we consider that Long Plain was merely attempting to establish further evidence of Canada's breach of its fiduciary obligations to the First Nation. The real remedy being sought by Long Plain is compensation for the loss of use of the shortfall lands based on the highest and best use of those lands since 1876, and therefore we will not comment further on the disgorgement remedy unless it is raised in the second stage of this inquiry, if convened, to consider the quantum of compensation owing by Canada to the First Nation.

Need for a Specific Parcel of Land

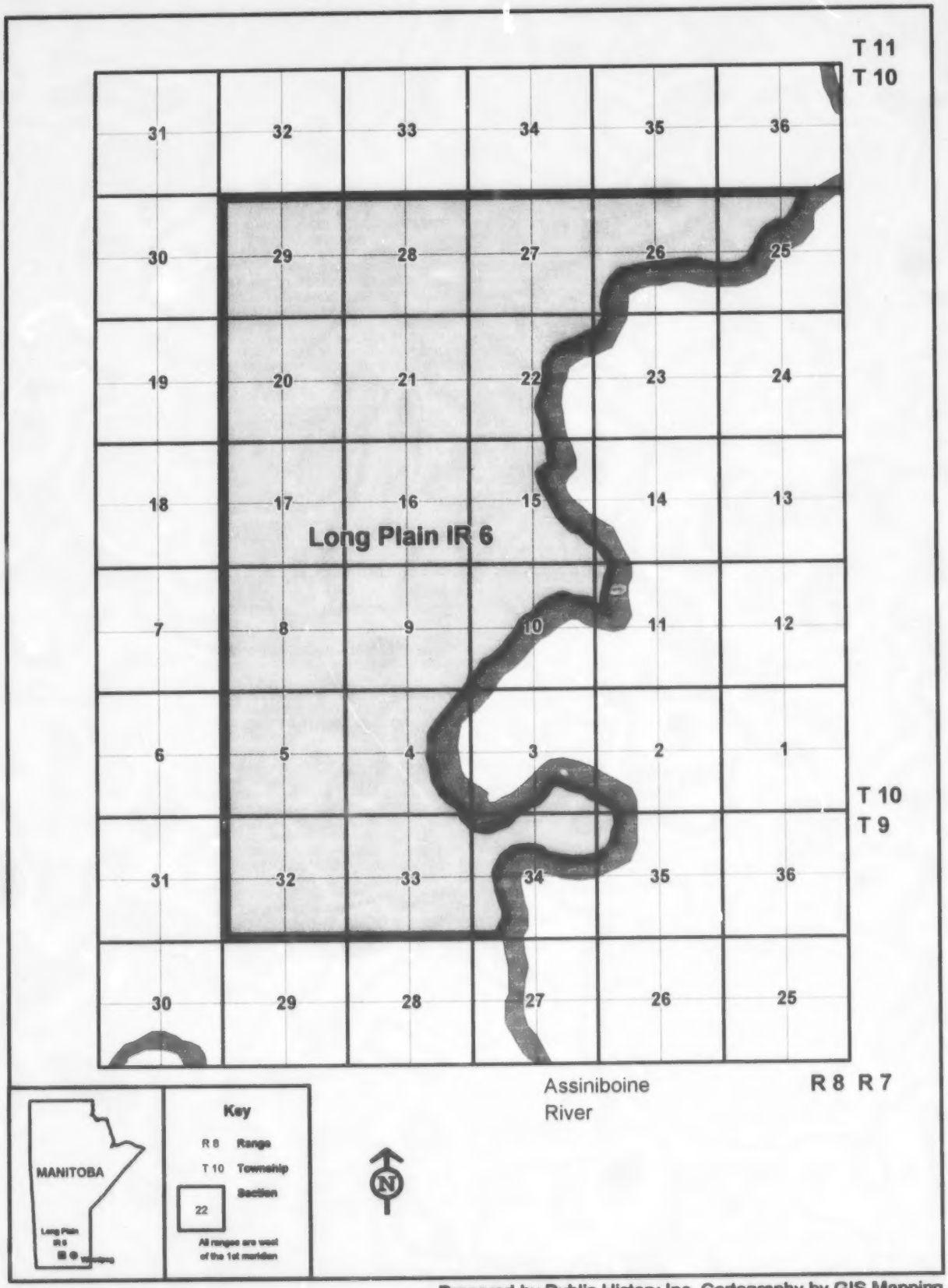
As we have seen, one of the major thrusts of Canada's position in this inquiry is that loss of use is not payable where there is no specific parcel of land in relation to which the calculation of loss of use can be applied. According to counsel, the exercise of calculating such loss using a hypothetical parcel of land is so speculative that a court would refrain from doing so.

Long Plain's response to this position is that the shortfall lands are not just identifiable but can be specifically identified as sections within townships 9 and 10, range 8, west of prime meridian. Indeed, in its rebuttal submission, the First Nation contends that the most likely lands are sections 28 and 29 lying west of the Assiniboine River and adjoining the south boundary of the original reserve, as well as the adjacent section 27 on *both* sides of the river (see map 2 on page 64).

With all due respect to counsel for the First Nation, based on the evidence before us we cannot conclude that sections 27, 28, and 29 were more or less likely to have been selected as additional reserve lands than any of the other 11 sections of land that border the north and west boundaries of IR 6. Indeed, we feel quite confident in observing that the portion of section 27 lying across the Assiniboine River to the east was, if anything, decidedly *less* likely to have been included in the reserve than any of the land bounding the north, west, and south boundaries of the reserve. There is no evidence before us to suggest that any part of IR 6 has ever been situated on the east side of the Assiniboine River. Therefore, a suggestion that additional reserve lands would have been set apart there lacks credibility.

We think it more likely that the 1877 acres, whether configured as sections or quarter sections, would have been drawn from the 8640 acres within the roughly 13½ sections of land adjacent to the reserve's inland boundaries, and possibly within the additional 1280 acres lying within the two additional sections lying diagonally adjacent to the northwest and southwest corners of the reserve. Which of these lands would have been selected would have depended on the characteristics of the individual parcels and the needs and desires of the Band in 1876.

That being said, we believe that, by making reasonable assumptions regarding the nature of the additional reserve land that would have been selected, it should be possible to derive a fair and realistic estimate of the compensation to which the First Nation is entitled as a result of the loss of use of the shortfall lands. As Waddams states in *The Law of Damages*:



Prepared by Public History Inc. Cartography by GIS Mapping

> The general burden of proof lies upon the plaintiff to establish the case and to prove the loss for which compensation is claimed. *In many cases the loss claimed by the plaintiff depends on uncertainties; these are of two kinds: first, imperfect knowledge of facts that could theoretically be known and secondly, the uncertainty of attempting to estimate the position the plaintiff would have occupied in hypothetical circumstances, that is to say, supposing that the wrong complained of had not been done*.
>
> American law has had considerable difficulty with this second type of uncertainty. The courts have used the requirement of certainty to inhibit or set aside what they consider to be excessive jury awards, with rigorous standards laid down in many cases. The consequence is that, where recovery is thought to be justified, the courts must strive to reconcile the results desired with prior restrictive holdings.
>
> *In Anglo-Canadian law*, on the other hand, perhaps because of the decline in the use of the jury, *the courts have consistently held that if the plaintiff establishes that a loss has probably been suffered, the difficulty of determining the amount of it can never excuse the wrongdoer from paying damages. If the amount is difficult to estimate, the tribunal must simply do its best on the material available*, though of course if the plaintiff has not adduced evidence that might have been expected to be adduced if the claim were sound, the omission will tell against the plaintiff....
>
> The claimant must do as much by way of proof as can reasonably be expected in the circumstances but need not do more.[95]

The practical application of this approach by the trial judge in *Guerin* was described by McLachlin J in the following terms in *Canson Enterprises*:

> The trial judge in *Guerin* did not measure damages as the difference between the lease which was entered into and that which the Band was prepared to authorize, because the golf club would not have entered into a lease at all on the terms sought by the Band, and it could not therefore be said that the breach had caused the Band to lose the opportunity to enter a lease on the authorized terms. Nor did the trial judge simply assess damages as the difference between the value of the lease actually entered into and the amount that the land was worth at the time of trial, which would be the result if causation were irrelevant. Rather he concluded that had there been no breach the Band would have eventually leased the land for residential development. He allowed for the time which would have been required for planning, tenders and negotiation, and he also discounted for the fact that some of the then current value of the surrounding developments was due to the existence of the golf course. *In other*

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[95] S.M. Waddams, *The Law of Damages*, 2nd ed. (Aurora, ON: Canada Law Book Inc., 1991), ¶ 13.10-13.40.

> ***words, he assessed, as best he could, the value of the actual opportunity lost as a result of the breach.***[96]

We have already noted the argument that *Guerin* should be distinguished from the present case because there is no doubt that the land in *Guerin* formed the subject matter of the lease to the golf club and was thus readily identifiable. However, we see no reason why, as a matter of law or policy, the principle of loss of use or lost economic opportunity, referred to in *Guerin* and elaborated upon by McLachlin J in *Canson Enterprises*, should be inapplicable where the subject land, although not precisely ascertainable, is at least confined to a limited general area that is readily capable of assessment.

In the cases we have reviewed, the significance of being able to identify specifically the assets forming the *res* or object of the equitable obligation is in *which* equitable remedies are available to the beneficiary, not *whether* remedies are available *at all*. Where there *is* a particular asset, remedies such as constructive trust, equitable lien, and tracing are available in proper circumstances to permit the asset to be restored *in specie* to the beneficiary. Where there is *no* such particular asset, such remedies are not available and equitable compensation is substituted to provide restitutionary relief to the extent that this can be accomplished by monetary means. The real question is what remedy – and, in the case of compensation, what quantum of compensation – is most appropriate to restore to the First Nation that which has been lost as a result of the breach, and whether any factors should operate to limit the extent of that remedy.

In fairness to Canada, we understand that the $16.5 million paid to Long Plain under the Settlement Agreement reflects considerably more than the current fair market value of the shortfall lands. This level of compensation, if attributed solely to the value of those 1877 acres, would yield a per acre value of roughly $8800, which would, we suspect, be a singularly unattractive and uneconomic price from the perspective of a purchaser of agricultural land in rural Manitoba. However, neither counsel before the Commission in this inquiry acted on his client's behalf during the negotiation of the Settlement Agreement, so neither was able to shed light on how the $16.5 million was allocated among market value of the shortfall lands and other heads of compensation. In

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[96] *Canson Enterprises Ltd. v. Boughton & Company*, [1991] 3 SCR 534 at 551-52. McLachlin J

any event, any compensation awarded for loss of use should, as a matter of law, be set off against that portion, if any, of the $16.5 million attributable to such loss. Indeed, the parties have also made this a matter of contract, as can be seen in the following provisions of Article 4 of the Settlement Agreement:

> **ARTICLE 4: SET OFF BY CANADA**
>
> 4.1 In the event the First Nation and Canada settle the First Nation's claim for Loss of Use, as a result of the process set out in Article 3 and, as a result, it is agreed that compensation is payable by Canada to the First Nation in respect of Loss of Use in an amount:
>
> (a) greater than at $16,500,000.00 Canada shall be entitled to set off against such quantum the sum of $13,500,000.00; or
>
> (b) less than or equal to $16,500,000.00, Canada shall be entitled to set off against such quantum the sum of $16,000,000.00, provided that in no case shall the First Nation be obliged to repay any amount of same to Canada.
>
> 4.2. In the event the claim of the First Nation is dealt with in any other way than in the manner described in Article 3 and in the result, an order is made in favor of the First Nation and against Canada:
>
> (a) where Canada has only paid to the First Nation the first instalment of the Federal Payment, Canada shall be entitled to set off the sum of $5,650,000.00 against the quantum of any amount it is ordered to pay to the First Nation; or
>
> (b) where Canada has paid to the First Nation both instalments of the Federal Payment, Canada shall be entitled to set off the sum of $13,500,000.00 against the quantum of any amount it is ordered to pay to the First Nation.[97]

Given that the parties have already provided in the Settlement Agreement as to how set-off, if required, is to be calculated, nothing further need be said about that issue here.

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[97] Settlement Agreement, August 3, 1994 (ICC Documents, pp. 540-41).

Relevant Considerations in Determining Compensation

Long Plain argues, based on equitable principles, that causation, foreseeability, and remoteness are irrelevant in measuring the compensation available for loss of use. The implication of this argument is that compensation is to be based on the First Nation's lost opportunity to apply the land to its highest and best use, taking full advantage of the knowledge gained in hindsight to assess that compensation.[98] Therefore, because "agriculture represents [the] highest and best use [of the shortfall lands,] ... the proper valuation can only be achieved by reference to the land's value year by year as rental property or by detailed analysis of each agricultural year from 1876 onward to ascertain net profit from the highest yielding/selling crop in that year and so on year by year for the whole of the loss period."[99]

In response, Canada submits that loss of use does not represent an appropriate measure of compensation where the breach is "occasioned by an honest mistake based on mere inadvertence, with no suggestion of bad faith."[100] Since, according to counsel, "there is no evidence that Canada has acted other than honestly, 'a modern court' would not award damages that exceeded the return of the original principle [sic] amount."[101]

On this point, we find that we cannot agree fully with either party. The reasons of La Forest J in *Canson Enterprises* and *Hodgkinson v. Simms* amply demonstrate that, in the interests of equity and fairness, it is necessary for a court to have careful regard for the circumstances of the case to permit it to fashion a remedy, whether legal or equitable, that is tailored to fit those circumstances. In the specific context of a claim for loss of use, the Commission is prepared to conclude that compensation for loss of use is *available* in proper circumstances, but, in determining the quantum of such an award the Commission must examine all relevant variables arising from the facts, including matters such as the quantum of shortfall land at issue, the economic value of that land, the period during which the shortfall existed, and the conduct of both parties during that period. It is only by

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98 Submissions on Behalf of the Long Plain First Nation, August 27, 1997, p. 61.

99 Submissions on Behalf of the Long Plain First Nation, August 27, 1997, p. 63.

100 Submissions on Behalf of the Government of Canada, September 26, 1997, p. 16.

101 Submissions on Behalf of the Government of Canada, September 26, 1997, p. 17.

considering these variables that the Commission can decide whether, on the facts of the case, compensation for loss of use should be awarded and, if so, on what basis and in what amount. It follows that the compensation payable for loss of use may vary significantly from one case to another. The quantum of compensation to which a band is entitled must, in the final analysis, be proportionate to the actual loss suffered. In undertaking this process, we regard questions of causation, foreseeability, remoteness, and mitigation as being very much in issue.

The consideration or weighing of these variables goes primarily to the issue of the *quantum* of compensation, and, in the context of the present proceedings, should be reserved, in our view, for the second stage of this inquiry. In the first instance, we recommend that the parties attempt to negotiate a settlement of the compensation to which the First Nation is entitled arising from the loss of use of the shortfall lands. If they are unable to reach a satisfactory settlement, it is, of course, open to them to return to the Commission to address the issue of quantum.

PART V

CONCLUSIONS AND RECOMMENDATION

We have been asked to inquire into and report on whether the Government of Canada owes an outstanding lawful obligation to the Long Plain First Nation with regard to the shortfall in reserve land allocated to the First Nation. More specifically, we have been asked to decide whether a band with an admitted shortfall in its treaty land entitlement is entitled to be compensated for its loss of use under the Specific Claims Policy. In this case, Long Plain did not receive funds in compensation for the outstanding shortfall lands until 118 years after the reserve was set aside, and the resultant claim for loss of use seeks compensation for the fact that the First Nation lost the use of those lands for that 118-year period.

On the question of liability, we conclude that, under the terms of the Specific Claims Policy, a band with an admitted shortfall in its treaty land entitlement is entitled to claim compensation for its loss of use of that shortfall acreage. In the Commission's view, loss of use is compensable as part of Canada's outstanding lawful obligation arising from a treaty land entitlement shortfall. There are three possible – and possibly concurrent – foundations for Canada's liability in this respect, two of which are evident in the present claim.

First, it may be said that Canada's failure to deliver a band's entire land entitlement is, in effect, a breach of the terms of the treaty itself. We have concluded in this case that Canada breached the terms of Treaty 1 and that this breach gives rise to an enforceable cause of action for loss of use compensation.

Second, we also believe that such a failure is a violation of the trust-like responsibilities that Canada owes First Nations in respect of matters concerning Indian title, and is therefore a breach of fiduciary duty. This is an alternative basis of liability only. Our finding of liability in this case is based on breach of treaty.

Finally, quite apart from this trust-like responsibility or general fiduciary obligation, Canada's conduct may, in certain cases, substantiate a separate cause of action based upon breach of fiduciary duty. We have declined to make such a finding in this case.

We have also provided very clear direction to Long Plain and Canada with respect to what we believe to be the proper approach to the quantification of such a loss of use claim. We have

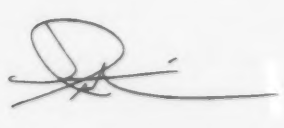
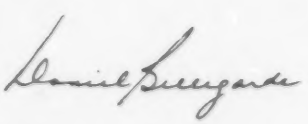
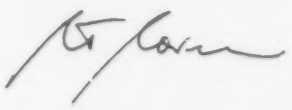
concluded that a claim of this nature, whether characterized as a breach of treaty or a breach of fiduciary duty, gives rise to an equitable jurisdiction in the determination of compensation. Therefore, all the factors that would be relevant in such a case in a court of equity must be considered to arrive at a result that is just, equitable, and proportionate to the wrong suffered. In particular, a court may have full regard for the conduct of both Canada and the band within the appropriate historical context, but also to common law principles of foreseeability, remoteness, causation, and mitigation. Canada's state of knowledge relative to the existence of the claim is one relevant consideration. So, too, is any explanation that Canada may offer for its failure to respond to the claim at an earlier date. Obviously, the amount of land at issue, the economic value of that land, and the period of time during which the obligation remained outstanding are also very relevant. In our view, all of these matters relate to the *quantification* of the First Nation's entitlement to compensation once it has been established that Canada is in breach of the terms of the treaty. Further characterizing Canada's conduct as a breach of fiduciary duty neither adds to, nor subtracts from, the remedies available in assessing compensation.

In conclusion, it is our recommendation that Canada accept and negotiate Long Plain's claim to be compensated for loss of use of the shortfall acreage. The Commission is certainly prepared to assist the parties in the determination of compensation, if requested.

We therefore recommend to the parties:

That the claim of the Long Plain First Nation regarding the loss of use of its treaty land entitlement shortfall be accepted for negotiation under the Specific Claims Policy.

FOR THE INDIAN CLAIMS COMMISSION

P.E. James Prentice, QC	**Daniel J. Bellegarde**	**Carole T. Corcoran**
Commission Co-Chair	**Commission Co-Chair**	**Commissioner**

Dated this 1st day of March, 2000.

APPENDIX A

LONG PLAIN FIRST NATION LOSS OF USE INQUIRY

1 Planning conferences

Edwin, Manitoba, August 29, 1995
Ottawa, December 9, 1996
Ottawa, February 14, 1997

2 Community sessions

By agreement of counsel for the parties, community sessions were considered unnecessary for dealing with the legal issue before the Commission at the inquiry.

3 Legal argument

Winnipeg, October 17, 1997

4 Content of formal record

The formal record for the Long Plain First Nation Loss of Use Inquiry consists of the following materials:

- the documentary record (4 volumes of documents)
- 8 exhibits tendered during the inquiry
- transcript of oral submissions (1 volume)
- written submissions of counsel for Canada and written submissions and rebuttal submissions of counsel for the Long Plain First Nation, including authorities submitted by counsel with their written submissions

The report of the Commission and letters of transmittal to the parties will complete the formal record of this inquiry.